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In the Supreme Court of the United States.

OCTOBER TERM, 1925.

No. [redacted]316

BEN F. WRIGHT, AUDITOR FOR THE PHILIPPINE ISLANDS,
Petitioner,

vs.

YNCHAUSTI AND COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS AND BRIEF IN SUPPORT THEREOF

L. H. HEDRICK,
O. R. MCGUIRE,
Attorneys for Petitioner.

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In the Supreme Court of the United States.

OCTOBER TERM, 1925.

No. ——

BEN F. WRIGHT, AUDITOR FOR THE PHILIPPINE ISLANDS,
Petitioner,

vs.

YNCHAUSTI AND COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

To The Honorable,
The Chief Justice and Associate Justice of the
Supreme Court of the United States:

Petitioner Ben F. Wright, Auditor for the Philippine Islands, respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the Supreme Court of the Philippine Islands in the case entitled Ynchausti & Company, Petitioner (Respondent here) vs. Ben F. Wright, as Auditor for the Philippine Islands, Respondent (Petitioner here), No. 23601.

I

THE CASE

This proceeding involves the jurisdiction and authority of the Auditor for the Philippine Islands under Sections

24 and 25 of the Jones Act of August 29, 1916, Ch. 416, (39 Stat. 545, 553, 554), hereinafter referred to as the Organic Act, to audit and settle all accounts pertaining to the revenues and receipts from whatever source of the Philippine Government; to settle and adjust all accounts whatever for and against the Philippine Government; to countersign all warrants for the drawing of public money from the Treasury of the Philippine Government; and the manner or method of review of the decisions and rulings of the said Auditor. It also involves the jurisdiction of the Insular Collector of Customs as provided in Section 1301 of the Administrative Code for Philippine Islands, 1917, to audit, settle and allow claims for refund of custom duties and the jurisdiction and authority under Section 26 of the Organic Act of the Supreme Court of the Philippine Islands to grant mandamus against the Auditor for the Philippine Islands requiring the said Auditor to allow a claim for refund of custom duties and to countersign a warrant chargeable to a general appropriation in the Treasury for the Philippine Government in payment of such claim.

Petitioner is commanded by the Supreme Court of the Philippine Islands to allow the claim of respondent (petitioner below) for refund of custom duties collected by the Insular Collector of Customs under paragraphs 200 and 348 of the Philippine Tariff Act of August 5, 1909, (36 Stat. 130, 157-159, 172-173) as amended by Act No. 2872 of the Philippine Legislature approved November 24, 1919, and which were deposited into the general fund of the Philippine Treasury pursuant to Section 610, Administrative Code, 1917, and Section 14, Chapter III, Act No. 2935. Petitioner is also commanded to countersign a warrant chargeable to a general and indefinite appropriation made by Act No. 357 of the Philippine Commission for refund of custom duties erroneously or illegally collected (R. 133).

The Supreme Court of the Philippine Islands held that the decision of the Insular Collector of Customs allowing

the claim for a refund of custom duties was a correct decision and that the jurisdiction and authority of petitoner with respect to allowance of claims approved by the Insular Collector of Customs for refund of custom duties was ministerial and that a writ of mandamus would issue requiring petitioner to countersign a warrant on the Treasury for the Philippine Government in payment of such claim.

II

THE PROCEEDINGS

The proceeding was instituted in the Supreme Court of the Philippine Islands by respondent, Ynchausti and Company. Its petition alleged it was the owner of the Steamship *Venus*, used in the coastwide trade of the Philippine Islands; that it caused certain repairs and reconstruction work to be done in Hongkong, China; that adequate facilities for doing such work were not available in the Philippine Islands; that upon return of the vessel to Philippine waters on or about October 20, 1924, the Insular Collector of Customs at Manila levied and collected P 159,960 duties; that the duties were paid under protest, claiming that such repairs and work were exempt from the payment of custom duties under paragraph 200, Section 8, and paragraph 348, Section 11, of the Philippine Tariff Act of 1909 as amended by Act No. 2872 of the Philippine Legislature; that the Insular collector of Customs subsequently sustained the protest and ordered refund of the duties collected; and that the Auditor for the Philippine Islands refused to countersign a warrant for refund of the duties (R. 2-5).

The answer of the petitioner (respondent below) among other things alleged that the custom duties originally collected by the Insular Collector of Customs had been covered into the Insular Treasury and had become a part of the general unappropriated funds of the Insular

Government pursuant to Section 14, Chapter III, of Act No. 2935 of the Philippine Legislature; that the petitioner was invested with jurisdiction and authority to settle and adjust all claims for refund of custom duties chargeable to general appropriations for refund of duties erroneously or illegally collected; that his actions in the premises are and were discretionary and not ministerial; that the court had no jurisdiction to review his discretionary actions in the premises; and that the respondent (petitioner below) had a plain, speedy and adequate remedy in the ordinary course of law (R. 12-17).

The respondent (petitioner below) demurred to the answer on the ground that it did not state facts sufficient to constitute a defense (R. 17-18). The Supreme Court for the Philippine Islands, Johnson and Ostrand, Justices dissenting (R. 85-130), sustained the demurrer and ordered issue of the writ as prayed (R. 61-85).

III

THE RESULT OF THE JUDGMENT BELOW

As a result, and even though neither the United States nor the Government of the Philippine Islands has consented to the latter being sued in the manner herein for refund of custom duties or on any other account, this proceeding, in the language of the Court in *Brashear* v. *Mason*, 6 Howard, 93, at page 102, "by mandamus would become as common, in the enforcement of demands upon the government, as the action of assumpsit to enforce like demands against individuals." A further result is that the Supreme Court of the Philippine Islands has assumed jurisdiction not conferred on it by the laws of the United States to control by mandamus the discretionary action of officials of said Island appointed by and responsible to the United States Government.

IV

QUESTIONS PRESENTED

(1) Whether the Auditor for the Philippine Islands may be controlled and directed by mandamus of the Supreme Court of the Philippine Islands in the audit and settlement of claims and accounts against the Government of the Philippine Islands chargeable to appropriations made in general terms for refund of custom duties alleged to have been erroneously or illegally collected.

(2) Whether the Auditor for the Philippine Islands performs and exercises a mere ministerial duty controllable by mandamus in the audit and settlement of claims and accounts for refund of custom duties approved by the Insular Collector of Customs and in the countersignature of warrants on the Treasury for the Philippine Government for the payment of refunds of custom duties or whether such duties of the Auditor are discretionary.

(3) Whether the laws of the United States confer exclusive jurisdiction and authority on the Insular Collector of Customs for the Philippine Islands independently of the Auditor for the Philippine Islands to audit, settle, and allow claims for refund of custom duties and if not, whether the construction of the court below of the laws of the Legislature for the Philippine Islands that all matters of discretion with respect to such claims are confined to the Insular Collector of Customs is the correct construction of said laws and if so, whether such laws are valid.

(4) Whether the sole and exclusive remedy of a claimant for refund of custom duties denied by the Auditor for the Philippine Islands is not limited to an appeal to the Governor General and to the Secretary of War or to the Philippine Legislature.

(5) Whether the Governor General for the Philippine Islands and the Secretary of War as the superior officers of the Auditor for the Philippine Islands are not neces-

sary and indispensable parties in any proceeding by mandamus against the said Auditor.

(6) Whether the Government of the Philippine Islands is not the real party in interest and a necessary and indispensable party in any proceeding by mandamus against the Auditor for the Philippine Islands to require the said Auditor to allow a claim for refund of custom duties and to countersign a warrant on the Treasury for the Philippine Government for payment of said claim.

V

REASONS FOR GRANTING THE WRIT

(1) The general importance to the relation of the United States with the Government for the Philippine Islands of the question whether the Supreme Court of the Philippine Islands has jurisdiction to require the Auditor for said Islands appointed by, and holding office at the pleasure of the President of the United States to allow claims against the Philippine Government and to countersign warrants chargeable to appropriations in general terms in payment of said claims.

(2) The general importance to the relation of the United States with the Government for the Philippine Islands of the question whether the decisions of the Auditor for the Philippine Islands in the audit and settlement of "all accounts pertaining to the revenues and receipts from whatever source of the Philippine Government" are "final and conclusive upon the executive branches of the government" as specified in Section 24 of the Organic Act, subject to the right of appeal as specified in Section 25 of said act, or whether such decisions and jurisdiction in respect to the allowance of claims for refund of custom duties and in the countersignature of warrants in payment of such claims are in subordination to the decisions and jurisdiction of the Insular Collector of Customs as held by the court below

in construing Section 1301 of the Philippine Administrative Code, 1917.

(3) The disregard of the applicable decisions of the Supreme Court of the United States in *Brashear* v. *Mason*, (6 Howard 92), *Decatur* v. *Paulding*, (14 Peters 497), and *United States* v. *Guthrie*, (17 Howard 294), that where consent has not been given to sue the Government, public moneys in the Treasury to the credit of general appropriations may not be withdrawn therefrom by extraordinary judicial processes directed against officers of the Government, the situation with respect to suits against the Government for the Philippine Islands being the same as that existing prior to the creation of the Court of Claims in 1855, for suits against the United States.

(4) The disregard of the applicable decisions of the Supreme Court of the United States in *United States* v. *Lynch*, (137 U. S. 280), that even after the Government had consented to be sued, the Auditors of the United States and the Comptroller of the Treasury may not be controlled by extraordinary judicial processes in the audit and settlement of claims and accounts and in their statutory duty to countersign warrants when lawfully chargeable to general appropriations in the Treasury in payment of claims, Section 24 of the Organic Act providing that the Auditor for the Philippine Islands shall, except as thereinafter provided, have "like authority as that conferred by law upon the several auditors of the United States and the Comptroller of the United States Treasury." The exception referred to is not a limitation of the authority of the Auditor.

(5) The disregard of the applicable decision of the Supreme Court of the United States in *Webster* v. *Fall, et al.*, (266 U. S. 507), that in any proceeding by extraordinary judicial process against a public officer, the superior of such officer is a necessary and indispensable party. By Section 24 of the Organic Act the Auditor for the Philippine Islands is "under the general supervision

of the Governor General" and his decisions are reviewable by both the Governor General and the Secretary of War.

(6) The disregard of the applicable decision of the Supreme Court of the United States in *Work* v. *United States on the Relation of Logan S. Rives* (267 U. S. 175), that extraordinary judicial process can not be invoked to operate as a writ of error to review the discretionary acts of public officers.

(7) The disregard of the applicable decisions of the Supreme Court of the United States in *Wells* v. *Roper*, (246 U. S. 335); *Louisiana* v. *McAdoo*, (234 U. S. 627), and *Oregon* v. *Hitchcock*, (202 U. S. 60), that a proceeding against a public officer concerning public money or property is in essence a proceeding against the Government which is a necessary and indispensable party, jurisdiction being determined by the real and not by the nominal parties in interest.

WHEREFORE, it is respectfully submitted that the writ of certiorari should issue as prayed.

L. H. HEDRICK,
O. R. MCGUIRE,
Attorneys for Petitioner.

THE UNITED STATES OF AMERICA }
DISTRICT OF COLUMBIA } ss:

L. H. Hedrick, being duly sworn, says that he is one of the attorneys for the petitioner herein and that he has carefully read and examined the foregoing petition, that the facts therein stated are true to the best of his knowledge, information and belief, and, in his opinion, the said petition is well founded and the case is one in which the prayer of the petitioner should be granted by this Court.

L. H. HEDRICK.

Subscribed and sworn to before me this 15th day of March, 1926.

N. CURTIS LAMMOND,
Notary Public.

(SEAL) My commission expires July 16, 1929.

BRIEF IN SUPPORT OF THE PETITION

The proceedings, opinions and judgment of the Supreme Court of the Philippine Islands entered, October 6, 1925, have not yet been reported. They are, however, set forth in the printed transcript of record filed in this case (R. 1-134).

JURISDICTION

The petitioner applies to this Court for a writ of certiorari to the Supreme Court of the Philippine Islands pursuant to authority granted by Sections 7 and 8 of the Act approved February 13, 1925, (43 Stat. 940).

The issuance of the writ, followed by a review by this Honorable Court of the record in the court below, is not sought in the hope this Court may find that the respondent is not entitled to a refund or that errors were committed in the decision of the lower court on the merits of the respondent's claim. For although the lower court concerned itself with and passed upon the merits of respondent's claim, this matter properly was not before it on any theory of the case.

The major question in the case is whether the duties of the Auditor of the Philippine Islands in connection with this claim were ministerial or discretionary. If ministerial the court had jurisdiction and should have issued the writ of mandamus, not because the court decided the claim was a just claim, but because the Insular Collector of Customs had decided it was a just claim. If discretionary the court should have denied the writ, regardless of their views on the merits of the claim, for

mandamus will not lie to compel the doing of a discretionary act in a certain way.

I

THE DETERMINATION OF THE AVAILABILITY OF A GENERAL APPROPRIATION FOR THE PAYMENT OF ANY CLAIM PAYABLE FROM A GENERAL APPROPRIATION IS A QUASI-JUDICIAL OR DISCRETIONARY MATTER WITHIN THE EXCLUSIVE JURISDICTION OF THE AUDITOR, SUBJECT ONLY TO THE ADMINISTRATIVE APPEALS PROVIDED BY LAW. FOR THE COURTS TO ATTEMPT TO CHANGE OR DISTURB THIS DETERMINATION BY MANDAMUS IS CONTRARY TO THE RULE LAID DOWN BY A LONG LINE OF DECISIONS OF THIS COURT, AND WILL DISRUPT THE GOVERNMENT ESTABLISHED FOR THE PHILIPPINE ISLANDS BY THE LAWS OF THE UNITED STATES.

Both Article I, Section 9, of the Constitution of the United States and Section 3 of the Act of August 29, 1916, (39 Stat. 546), (hereinafter referred to as the Organic Act) establishing an autonomous government for the Philippine Islands provide that no money shall be drawn from either Treasury except in pursuance of an appropriation by law. This Court pointed out in *Brashear* v. *Mason*, (6 Howard 93), at pages 100 and 101, in a mandamus proceeding against the Secretary of the Navy, to secure a payment alleged to be chargeable to a general appropriation that:

> We are also of opinion, that if the plaintiff had made out a title to his pay as an officer of the United States Navy, a mandamus would not lie in the court below to enforce the payment.
>
> The Constitution provides, that no money

shall be drawn from the treasury but in consequence of appropriations made by law. (Art. I, Sec. 9.) And it is declared by act of Congress (3 Statutes at Large, p. 689, Sec. 3), [now Section 11 of the Act of July 31, 1894, 28 Stat. 209] that all moneys appropriated for the use of the war and navy departments shall be drawn from the treasury by warrants of the Secretary of the treasury, upon requisition of the Secretaries of these deparements, countersigned by the second comptroller.

And by the act of 1817 (3 Statutes at Large, p. 367, Secs. 8, 9), [now Section 11 of the Act of July 31, 1894, 28 Stat. 209], it is made the duty of the comptroller to countersign the warrants only in cases when they shall be warranted by law. * * *

Formerly the moneys appropriated for the war and navy departments were placed in the treasury to the credit of the respective secretaries. That practice has been changed, and all the moneys in the treasury are in to the credit or in the custody of the treasurers, and can be drawn out, as we have seen, only on the warrant of the Secretary of the Treasury countersigned by the comptroller.

Section 24 of the Organic Act provides that the Auditor for the Philippine Islands "shall have like authority as that conferred by law upon the several auditors of the United States and the Comptroller of the United States" except that there is an administrative appeal from his decisions to the Governor General and the Secretary of War. Ex-President and now Chief Justice Taft said at page 81 of his book on *Our Chief Magistrate and His Powers*, with respect to the discretion of the Comptroller of the Treasury under the Dockery Act of July 31, 1894, (28 Stat. 205, 211) that:

Then consider the drawing of money from the Treasury Department under an appropriation act. The drawing of the warrant must be approved by the Comptroller of the Treasury (now

> the Comptroller General). It is for him to say how the appropriation act shall be construed and whether the warrant is lawful and whether the money can be drawn. The Comptroller of the Treasury is an appointee of the President, and in a general sense is his subordinate. If the President does not like him as a Comptroller, he can remove him and with the consent of the Senate put in another one, but under the act of Congress creating the office, the President cannot control or revise the decisions of this officer. His work is like the work I have referred to, quasi-judicial. If the claim is rejected by him, the claimant may in some cases carry his claim into the Court of Claims, but if he decides for the claimant, the public and those interested in maintaining the side of the Government have no appeal, and his decision is final.

and at pages 125, 126 that:

> Congress may repose discretion in appointees of the President, which the President may not himself control. The instance I have already given is one of these, in which the Comptroller of the Treasury has independent quasi-judicial authority to pass on the question of what warrants are authorized by appropriation acts to be drawn by him on the funds of the Treasury. The President can appoint him and remove him, but may not control his construction of appropriation acts and his signing, or withholding his signature from warrants in accordance with that construction.

The United States Court of Claims was not established until 1855, and the *Brashear case* as well as the cases of *Decatur v. Paulding* (14 Peters 497), *United States* v. *Guthrie* (17 Howard 94), and *Reeside* v. *Walker* (11 Howard 272), were decided prior to that date and represent attempts to secure public money from appropriations in the Treasury.

Neither the United States nor the Philippine Government has authorized suits of this kind, nor has the legis-

lature for the Philippine Government appropriated a specific sum for the payment of this particular claim, and we respectfully submit that the Supreme Court of the Philippine Islands has no more jurisdiction to issue mandamus requiring general appropriations to be paid out of the Philippine Treasury than has the courts of the United States. The remedy of an aggrieved claimant in a case of this nature is to prosecute an appeal to the Governor General and Secretary of War, as provided in Section 24 of the Organic Act, or to apply to the legislature of the Philippine Islands for a specific appropriation to pay the claim.

It long has been settled that extraordinary judicial process can not be used to control the acts of the accounting officers of the United States in the allowance and payment of claims from general appropriations in the Treasury. *United States* v. *Lynch* (137 U. S. 280). Even since the United States has consented to be sued on certain limited causes of action, the courts have been given no jurisdiction to determine the availability of general appropriations to pay claims and their judgments against the United States must be specifically reported to Congress for an appropriation with which to pay the same. Acts of September 30, 1890 (26 Stat. 537), and February 18, 1904 (32 Stat. 41).

This procedure of imposing exclusive jurisdiction in the Comptrollers of the United States Treasury to determine the availability of general appropriations in the United States Treasury and the countersignature of warrants to secure such money therefrom, with the right of appeal only to administrative officers or to the Congress, has obtained since the Ordinances of September 26, 1778, of the Continental Congress (Vol. XII, Journals, Continental Congress, pp. 956-961). See Acts of September 2, 1789 (1 Stat. 65), March 3, 1817 (3 Stat. 366), July 31, 1894 (28 Stat. 205-211), and June 10, 1921 (42 Stat. 24, 27). *Prior to the establishment of the Court of Claims in 1855, the decisions of the accounting officers*

were conclusive as to the merits of a claim, subject only to an appeal to certain specified administrative officers or to the Congress. Since that date their decisions are conclusive on the executive branches of the Government in all cases (Act of March 30, 1868, 15 Stat. 54, Section 191, Revised Statutes, Section 305 of the Act of June 10, 1921, 42 Stat. 24), subject only in certain specified cases to administrative appeal, and are conclusive upon the courts with respect to the availability of general appropriations in the Treasury; that is, as to the method of payment, for even after judgment by a court, the money to pay same must be specifically appropriated. Such decisions are reviewable by the courts only in the cases, and in the courts, and in the manner provided by statute. Mandamus is not the method authorized in this class of cases under the laws applicable to the Philippine Islands.

Since the Auditor for the Philippine Islands with respect to general appropriations of the Philippine Government has even greater jurisdiction than the accounting officers of the United States have with respect to general appropriations in the United States Treasury, and since no such jurisdiction as has been assumed in this case ever has been conferred upon the courts of the Philippine Islands over the subject-matter of claims against the Philippine Government, nor (as will be hereinafter shown) to control by mandamus the Auditor of the Philippine Government in the performance of his discretionary duties in the settlement of claims and the countersignature of warrants in payment thereof, it would appear necessarily to follow that the judgment below is not only erroneous and in conflict with a long line of decisions of this Court, but if permited to stand will seriously disrupt the system of Government for the said Islands as established by the laws of the United States.

II

THE DUTIES OF THE AUDITOR FOR THE PHILIPPINE ISLANDS IN THE SETTLEMENT OF CLAIMS OF A CLASS PAYABLE FROM GENERAL APPROPRIATIONS AND THE COUNTERSIGNING OF WARRANTS THEREFOR ARE QUASI-JUDICIAL OR DISCRETIONARY. THE ATTEMPT OF THE COURT BELOW TO COMPEL THE PERFORMANCE OF THESE DUTIES IN A PARTICULAR MANNER IS IN DISREGARD OF AND CONTRARY TO THE DECISIONS OF THIS COURT.

The duties of the Auditor for the Philippine Islands to "examine, audit and settle all accounts pertaining to the revenues and receipts from whatever source of the Philippine Government," and "to audit, in accordance with laws and administrative regulations, all expenditures of funds or property pertaining to or held in trust by the Government," and "to communicate directly with any person having claims before him for settlement" and to "*perform a like duty with respect to all government branches*" as provided in Section 24 of the Organic Act, are discretionary duties and apply to the Insular Collector of Customs equally with all other branches of the Government. Such duties are more discretionary than those of the Commissioner of Patents which this Court held in *Butterworth* v. *Hoe*, (112 U. S. 67), to be discretionary and not subject to control by judicial process; and more discretionary than the duties of the Secretary of the Interior, considered by this Court in *Work* v. *United States, Ex Rel Rives* (267 U. S. 175), for the accounting officers of the United States are required under Section 236 of the Revised Statutes as amended by Section 305, the act of June 10, 1921 (42 Stat. 21), to audit and settle the account after the Secretary of the Interior had made an allowance, and to determine the

availability of appropriations to pay said account. Furthermore, it has been held in *Brashear* v. *Mason,* and *Decatur* v. *Paulding, supra,* that even the duties of administrative officers with respect to determining a claim chargeable to general appropriations were discretionary and not subject to control by judicial process.

The Court stated in *United States* v. *Lamont* (155 U. S. 303), at page 308, that:

> The duty to be enforced by mandamus must not only be merely ministerial, but it must be a duty which exists at the time when the application for the mandamus is made. Thus in the case of *Ex parte Rowland,* 104 U. S. 604, 612, this court speaking through Mr. Chief Justice Waite, said: "It is settled that more cannot be required of a public officer by mandamus than the law has made it his duty to do. The object of the writ is to enforce the performance of an existing duty, not to create a new one."
>
> Moreover, the obligation must be both peremptory, and plainly defined. The law must not only authorize the act, *Commonwealth* v. *Boutwell,* 13 Wall. 526, but it must *require* the act to be done. "A mandamus will not lie against the Secretary of the Treasury unless the laws require him to do what he is asked in the petition to be made to do," *Reeside* v. *Walker,* 11 How. 272; see also *Secretary* v. *McGarrahan,* 9 Wall. 298; and the duty must be "clear and indisputable." *Knox County Commissioners* v. *Aspinwall,* 24 How. 376.

Moreover, Section 5 of the Administrative Code for the Philippine Islands, 1917, expressly provides that:

> The exercise of the permissive powers of all executive or administrative officers and bodies is based upon discretion, and when such officer or body is given authority to do any act but not required to do such act, the doing of the same shall be dependent on a sound descretion to be exercised for the good of the service and benefit of the public, whether so expressed in the statute giving the authority or not.

Even were the question an original one this law is conclusive that the Auditor for the Philippine Islands performs discretionary duties in the settlement of claims for refund of custom duties and in the countersignature of warrants chargeable to general appropriations for the payment of such claims. Under the unanimous decisions of this Court commencing with *Marbury* v. *Madison* (1 Cranch 137), mandamus can not be issued to control him in such discretionary action regardless of whether he erred therein. As said in *Riverside Oil Company* v. *Hitchcock* (190 U. S. 316):

> Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law (and the facts) was, and the courts have no power whatever under these circumstances to review his determination by mandamus or injunction.

So here, the acts of Congress establishing the office of Auditor for the Philippine Islands defined the duties of such office in a manner to leave no other reasonable conclusion than that they are discretionary in character, and the legislature of the Philippine Government has made express provision to like effect. We, therefore, respectfully submit that the judgment of the court below is contrary to a long line of decisions of this court with relation to this matter and should be reviewed by this court.

III.

THE CASE OF SMITH V. JACKSON (246 U. S. 338) DISTINGUISHED.

The court below placed great weight on *Smith* v. *Jackson*, (246 U. S. 338), wherein was sustained the action of the United States Court for the Canal Zone in issuing a writ of mandamus to the Auditor of the Panama

Canal Zone. There the Congress had appropriated in the Act of March 3, 1915 (38 Stat. 883), for "salaries of district judge $6,000," etc. It was held in that case that the payment of the salary as appropriated by Congress in a fixed and definite sum to a definite person was a ministerial duty. That is not the situation here for there was no fixed and definite sum appropriated by the Legislature of the Philippine Islands as a refund to the respondent (petitioner below) of custom duties. The question whether appropriations made in general terms to make refund of custom duties erroneously or illegally collected and not considered by the Court of First Instance were available to make refunds to respondent depended on the law and facts of respondent's claim and was exclusively committed to the sound discretion of the Auditor for the Philippine Islands.

A full statement of the facts in the *Smith* v. *Jackson case* is contained in 241 Fed. 747. The attention of the Court is particularly invited to the sections of the Code for the Canal Zone, quoted on page 752 of said volume, as to the authority of the Court for the Canal Zone to issue writs of mandamus. This authority was exceedingly more comprehensive than that conferred on United States Courts generally. See *Barber* v. *Hetfield*, 4 Fed. (2nd) 245, where this was pointed out. Also the Auditor for the Panama Canal Zone was not an accounting officer of the Treasury within the meaning of the Ordinance of 1778, act September 2, 1789, March 3, 1817, July 31, 1894, *supra*, with whose duties those of the Auditor for the Philippine Islands are assimilated by Section 24 of the Organic Act. In fact, the duties of the Auditor for the Panama Canal Zone are analagous to those of the Insular Collector of Customs in this case. He is an administrative examiner of accounts such as is common to all of the departments and establishments of the Government and the claims and accounts examined by him were required by the act of October 22, 1913, (36 Stat. 209) to be thereafter settled and adjusted by the Auditor

for the War Department, one of the former auditors of the Treasury. Not so, as to the settlements of the Auditor for the Philippine Islands. They are final unless reversed on administrative appeal as provided in Section 24 of the Organic Act.

There has been no case in the Supreme Court of the United States since the foundation of the Government (and the offices of auditors and comptrollers of the United States have been in existence throughout that period) where said Court has sustained the issuance of mandamus or injunction against them. The fact that until 1855 there existed no remedy whatever at law against the United States, was not sufficient to permit such action and as heretofore shown, the situation in the present case with respect to suits against the Philippine Government is the same as that prior to 1855 with respect to suits against the United States.

The reason for the rule is clear. The Constitution of the United States confers exclusive control over public money to the Congress and as pointed out by Ex-President Taft, in his book on Our Chief Magistrate and His Powers, the Congress has committed exclusive authority and jurisdiction (unless otherwise specifically provided by law) to the comptrollers to determine the availability of general appropriations to pay claims. The Congress has also established courts of inferior jurisdiction and conferred upon them authority to hear and determine claims against the United States and has provided expressly how the judgments may be paid. There is no overlapping of the jurisdiction of such courts and the comptrollers and both are subordinate to the Congress with respect to public money. The same situation exists with respect to the Auditor for the Philippine Islands and the Supreme Court of said Islands, with the difference that (except where an appeal from the Insular Collector of Customs to the Court of First Instance as provided by law has been perfected) said courts have had no jurisdiction conferred on them to hear and determine

such claims against the Philippine Government or to determine the availability of general appropriations to pay such claims. Said jurisdiction is exclusively that of the Auditor subject to appeal as provided in Section 24 of the Organic Act to the Governor General and to the Secretary of War, or to the Legislature of the Philippine Islands in accordance with the principles stated in *Reeside* v. *Walker, Brashear* v. *Mason, Decatur* v. *Paulding, supra.*

IV

THE SUPREME COURT OF THE PHILIPPINE ISLANDS HAS NO GREATER JURISDICTION IN MANDAMUS ACTIONS THAN HAVE THE COURTS OF THE UNITED STATES.

Section 9 of the Act of July 1, 1902 (32 Stat. 691, 695), to temporarily provide for the government of the Philippine Islands, provided that "the Supreme Court and the courts of First Instance of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided and such additional jurisdiction as shall hereafter be prescribed by the government of said Islands, subject to the power of said government to change the practice and method of procedure." Section 26 of the Organic Act provides that the Supreme Court of the Philippine Islands "shall possess and exercise jurisdiction as heretofore provided and such additional jurisdiction as shall hereafter be prescribed by law."

The Spooner Amendment of March 2, 1901 (31 Stat. 910) provided that "All military, civil and judicial powers necessary to govern the Philippine Islands" shall until otherwise provided by Congress, "be vested in such persons and shall be exercised in such manner as the President of the United States shall direct." Section 515 of Laws of United States Philippine Commission (House Document No. 11, 57th Congress, 1st Session, 1901-1902), provides that:

> * * * The Supreme Court shall have concurrent jurisdiction with the Courts of First Instance in all cases where an inferior tribunal, corporation, board, or person unlawfully neglects the performance of an act which the law specially enjoins as a duty resulting from an office of trust or station, or unlawfully excludes the plaintiff from the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully excluded by such inferior tribunal, corporation, board, or person, and also shall have original jurisdiction over Courts of First Instance and Judges thereof wherever said Court or Judge unlawfully neglects the performance of a duty which the law specifically or specially enjoins as a duty imposed upon such Court or Judge. The procedure of the Supreme Court in mandamus proceedings shall be the same as those provided for mandate in Sections 222, 223, 224, and 225 of this Code.

The foregoing defines the jurisdiction of the Supreme Court of the Philippine Islands, but confers no greater jurisdiction for the issuance of writs of mandamus than has been conferred upon courts of the United States, and it needs no argument to demonstrate that the latter have never had jurisdiction for the issuance of writs of mandamus to require the performance of discretionary acts in a particular manner.

V

THE JURISDICTION OF THE INSULAR COLLECTOR OF CUSTOMS TO SETTLE CLAIMS FOR REFUND OF CUSTOMS DUTIES IS SUBORDINATE TO THAT OF THE AUDITOR FOR THE PHILIPPINE ISLANDS. THE DECISION OF THE COURT BELOW TO THE CONTRARY IS AN ERRONEOUS CONSTRUCTION OF A FEDERAL LAW INVOLVING A QUESTION OF

SUBSTANCE WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Section 24 of the Organic Act expressly provides that the Auditor of the Philippine Islands "shall examine, audit and settle all accounts pertaining to the revenues and receipts from whatever source of the Philippine Government," and "audit, in accordance with laws and administrative regulations, all expenditures of funds," and that the Auditor is authorized "to communicate directly with any person having claims before him for settlement," the last clause showing clearly that his "audit" of expenditures includes "settlement" of claims.

That the jurisdiction of the Auditor in the performance of the foregoing duties applies to the actions of the Insular Collector of Customs clearly is shown by the further provision of the foregoing section that the Auditor "shall perform a like duty with respect to all government branches." That the jurisdiction of the Insular Collector of Customs (considered by this Court in *Gsell* v. *Insular Customs Collector* (239 U. S. 93), to allow claims for refund of custom duties payable from general appropriations in the Philippine Treasury is subordinate to that of the Auditor for the Philippine Islands is shown by the further provision of said foregoing section that the decision of the Auditor "shall be final and conclusive on the executive branches of the Government."

Section 614 of the Administrative Code, 1917, provides that "Insular revenue and trust funds shall not be withdrawn from the Insular Treasury except upon warrant" and Section 621, provides that:

> No Insular warrant shall be paid by the Treasurer until countersigned by the Auditor or by an Officer of the Bureau of Audits thereunto authorized in writing by him.

While warrants may be drawn under Sections 616 and 1301 of the Code by the Insular Collector of Customs for refund of custom duties, such warrant cannot be paid

until the countersignature of the Auditor has been first had and obtained.

Thus it is that the accounts of the Insular Collector of Customs are required to be audited and settled by the Auditor for the Philippine Islands and the warrants signed by the Collector for refunds of duties are valueless until countersigned by the Auditor and in both instances the plain and unambiguous terms of the statute makes the Auditor's decisions final and conclusive on the Collector. We respectfully submit that it is difficult to conceive upon what theory all discretion is confined to the Collector and that the Auditor's duties in the premises are merely ministerial.

The provision of Act No. 355 of the Philippine Commission in 1902 authorizing an appeal from the decision of the Insular Collector of Customs to the Court of Customs Appeal, changed in 1905 by Act No. 1405 to authorize such appeal to a Court of First Instance, and now carried in Sections 1383 and 1384 of the Administrative Code of the Philippine Islands, in nowise affects the jurisdiction of the Auditor over the allowance of claims by an executive branch of the Government. In the Organic Act the Congress provided:

> The laws now in force in the Philippine Islands shall continue in force and effect, except as altered, amended, or modified herein, until altered, amended, or repealed by the legislative authority herein provided or by Act of Congress of the United States. (Section 6.)
>
> The legislative authority herein provided shall have power when not inconsistent with this Act, by due enactment to amend, alter, modify, or appeal any law, civil or criminal, continued in force by this Act as it may from time to time see fit. (Section 7.)

Thus the above provisions relating to appeal from the decision of the Insular Collector of Customs, whether considered as in force at the time of the enactment of the Organic Act, or as amended, altered, or modified by

the Philippine Legislature since that time, must square with the provisions of the Organic Act, else they must fall. To construe them as carving out of all the claims against the Philippine Government a class of claims over which the Auditor has no control and concerning which he has merely a ministerial duty to perform, as the Supreme Court of the Philippine Islands did construe them in this case, is to fly in the face of the express provisions of the Organic Act in defining the powers and duties of the Auditor, that "he shall perform a like duty with respect to all Government branches."

A construction consistent with the provisions of the Organic Act and one that gives full effect to the provisions of the Administrative Code is the one to be sought, and its discovery presents no difficulty. Such a construction is that the Congress and the Philippine Legislature have consented that the Philippine Government may be sued in the Courts of First Instance, with an appeal therefrom to the Supreme Court of the Philippine Islands, on a claim for refund of custom duties, which claim has been passed upon by the Insular Collector of Customs, when, and only when, the suit is commenced by way of appeal from the decision of the Insular Collector of Customs, either by an aggrieved claimant or by the head of the Department (Secretary of Finance) on behalf of the Government, and when such appeal is taken within fifteen days after notice of the decision of the Insular Collector of Customs. Thus when a suit is so commenced, and in no other manner is a suit on such a claim against the Government authorized, the determination of the validity of the claim is transferred from the jurisdiction of the Executive Department of the Government to that of the Judicial Department, over which the Auditor neither has nor claims any control. The decision of the court in such a case is a judgment, not reviewable except by the Supreme Court, and payable out of the general and indefinite appropriation made by Act. No. 357 of the Philippine Commission.

On the other hand where such a claim is passed upon by the Insular Collector of Customs, but no appeal is taken from his decision as provided above, that is no suit is commenced in the Court of First Instance in the manner and within the time provided as set forth above, the claim remains within the jurisdiction of the Executive Branch of the Government, and the decision of the Insular Collector of Customs thereon, being the decision of an officer of the Executive Branch of the Government, is reviewable by the Auditor as are such decisions of the officers of all the executive branches, and is final and conclusive, except for the appeal to the Governor General and the Secretary of War provided by Section 25 of the Organic Act.

We, therefore, respectfully submit that the construction placed upon the provisions of the Organic Act by the Supreme Court of the Philippine Islands is erroneous, and involves a question of substance relating to the construction of said Act which has not been, but should be, settled by this Court.

VI

TO GRANT A WRIT OF MANDAMUS WHERE THE LAW PROVIDES A PLAIN, SPEEDY AND ADEQUATE REMEDY IS CONTRARY TO THE DECISIONS OF THIS COURT.

The Organic Act provides that:

> Any person aggrieved by the action or decision of the auditor in the settlement of his account or claim may, within one year, take an appeal in writing to the Governor General, which appeal shall specifically set forth the particular action of the auditor to which exception is taken, with the reason and authority relied on for reversing such decision.
>
> If the Governor General shall confirm the action of the auditor, he shall so indorse the appeal

> and transmit it to the auditor, and the action shall thereupon be final and conclusive. Should the Governor General fail to sustain the action of the auditor, he shall forthwith transmit his grounds of disapproval to the Secretary of War, together with the appeal and the papers necessary to a proper understanding of the matter. The decision of the Secretary of War in such case shall be final and conclusive. (Section 25.)

This remedy is plain, speedy and adequate, and the law provides it as an exclusive and final remedy. The granting of the writ of mandamus in the face of such a remedy is contrary to the rule laid down by a long line of decisions of this Court that where the law provides administrative appeals the Court will not interfere with extraordinary legal process, at least, until final decision is had upon the administrative appeal. (*Ekiu* v. *United States*, 142 U. S. 651; *United States* v. *Sing Tuck*, 194 U. S. 161; *United States* v. *Ju Toy*, 198 U. S. 253; *United States* v. *Duell*, 172 U. S. 576.)

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari in this case should be granted.

L. H. HEDRICK,
O. R. MCGUIRE,
Attorneys for Petitioner.

NOTICE OF FILING PETITION

Messrs. Britton & Gray,
Attorneys at Law,
Wilkins Building, 1512 H Street, N. W.,
Washington, D. C.

Attention of: Mr. Lawrence H. Cake.

Gentlemen:

Please take notice that a petition for a writ of certiorari directed to the Supreme Court of the Philippine Islands in the case entitled in that court, "Ynchausti and Company, Petitioner, versus Ben F. Wright, as Auditor for the Philippine Islands, Respondent," was filed in the Supreme Court of the United States on the 6th day of March, 1926, by Ben F. Wright, Auditor for the Philippine Islands, as petitioner, together with supporting brief and transcript of the record in the case.

L. H. HEDRICK,
O. R. MCGUIRE,
Attorneys for Petitioner.

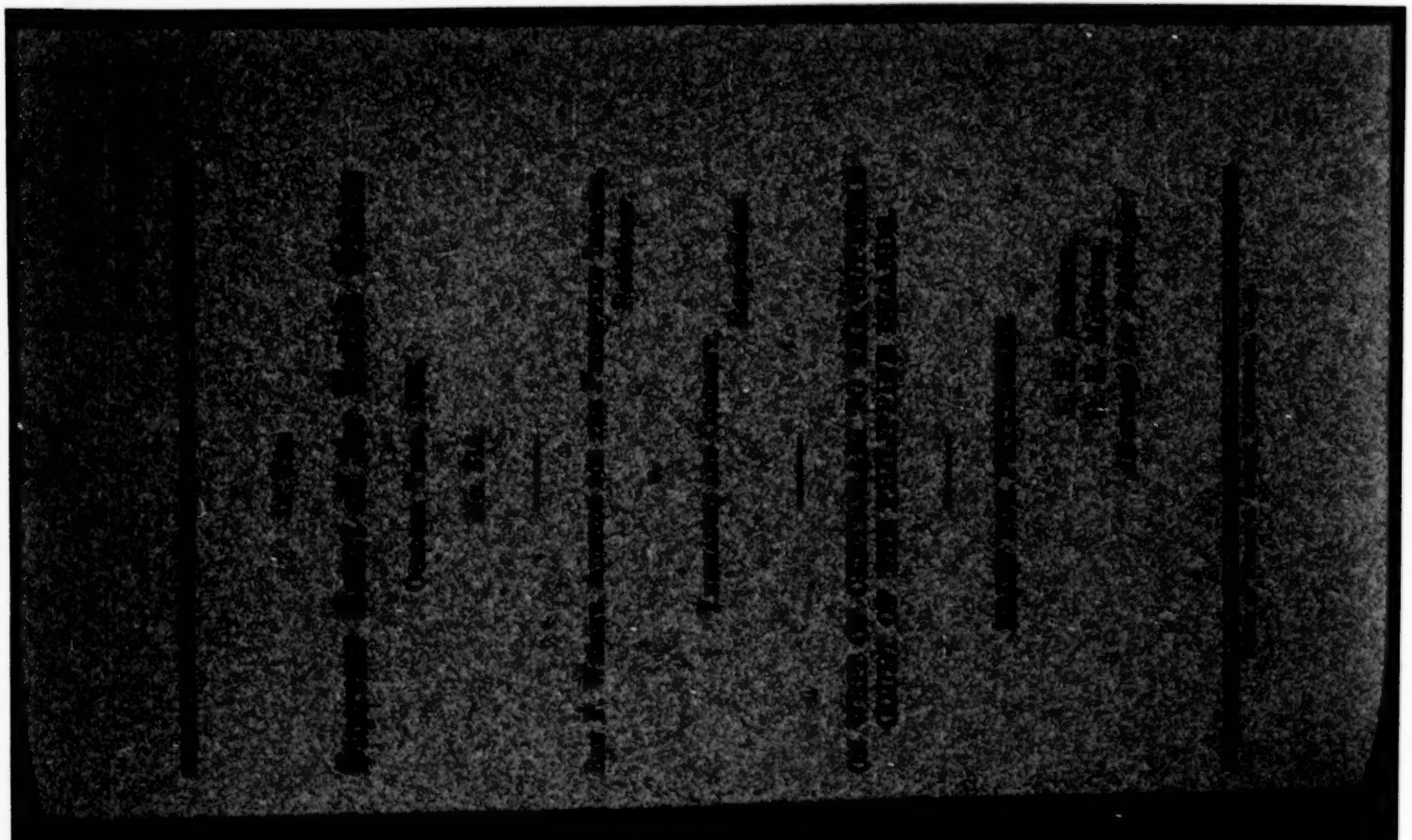
Washington, D. C.,
March —, 1926.

ACCEPTANCE OF SERVICE

Due, legal and timely service of the foregoing petition, brief and notice, and of the transcript of the record in the case in the court below, by delivery of printed copies thereof is hereby acknowledged this 6th day of March, 1926, at Washington, D. C.

BRITTON & GRAY,
By Lawrence H. Cake
Attorneys for Respondent.

PETITIONER'S BRIEF



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In The

Supreme Court of the United States

October Term, 1926.

No. 316.

Ben F. Wright, Auditor for the Philippine Islands,
Petitioner,

v.

Ynchausti and Company,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS

BRIEF FOR PETITIONER

PRELIMINARY STATEMENT

This case is here on certiorari to the Supreme Court of the Philippine Islands to review a judgment entered

October 6, 1925 (R-132) granting the petition of Ynchausti and Company (petitioner below and hereinafter referred to as Company), for a writ of mandamus directing Ben F. Wright, Auditor for the Philippine Islands (respondent below and hereinafter referred to as the Auditor) to countersign a certain warrant drawn by the Insular Collector of customs (hereinafter referred to as Collector) as refund of customs duties in the sum of P159,960.00 chargeable to a general appropriation in the Insular Treasury for refund of customs duties erroneously and illegally collected.

STATEMENT OF THE CASE

The pleadings below consisted of the Company's petition (R-1, 5) the Auditor's answer (R-12, 17) and the Company's demurrer thereto (R-17, 18). By a divided court the demurrer was sustained and judgment entered granting the writ as prayed. As stated in the dissenting opinion (R. 87-91), the only facts properly before the court were those alleged in the petition, which were admitted in the answer and those alleged in the answer which the demurrer thereto necessarily admitted. These facts may be epitomized as follows:

The Company is the operator of the Steamship *Venus* engaged in the coastwise trade of the Philippine Islands. Certain repairs and reconstruction work were made on said vessel in Hongkong, China, and upon return of the vessel to Philippine waters on or about October 20, 1924, the Collector assessed P159,960.00 customs duties on the vessel as provided by paragraph 200 of Section 8, of the Philippine Tariff Act of 1909 (36 Stat. 159), as amended by Act No. 2872, on the ground that adequate facilities were available in the Philippine Islands for making such repairs,

reasonably economically, and within a reasonable time. The Auditor approved the assessment and thereupon the said sum of P159,960.00 was collected by the Collector and deposited pursuant to Section 14 of Act No. 2935, in the Insular Treasury, as a part of the general unappropriated fund in said Treasury.

Thereafter, within the prescribed time, the Company, in accordance with Section 1370, Administrative Code of the Philippine Islands, 1917 (hereinafter referred to as the Code), presented a written protest to the Collector alleging that adequate facilities for making the repairs and doing the reconstruction work on the *Venus* were not available in the Philippine Islands and claiming refund of P159,960.00 paid as customs duties on the ground of exemption under paragraph 200, Section 8, and paragraph 348, Section 11, of the Philippine Tariff Act of 1909. The only fund out of which customs duties could be refunded without specific action of the Philippine Legislature, approved by the Governor General, is the general and indefinite appropriation made by Act No. 357, as amended by Act No. 1515, for refunds of customs duties *erroneously* and *illegally* collected.

The Collector heard and examined the Company's protest and on October 31, 1924 (R-19, 20) rendered his decision sustaining the same and concluding that a refund in full should be made of the customs duties collected on the *Venus*. A copy of the decision was sent by the Collector to the Auditor as provided in Section 1386 of the Code and the latter made or caused to be made inquiries and investigations for the purpose of ascertaining and verifying the correctness of the conclusion that the repairs and reconstruction work could not have been made in the Philippine Islands.

(R-14, par 11). The purpose of such ascertainment and verification was to enable the Auditor to determine whether the refund ordered by the Collector could be paid from the general and indefinite appropriation made by Act No. 357, as amended; that is, whether the refund ordered by the Collector was of customs duties *erroneously* and *illegally* collected.

The Auditor became convinced, as a result of his inquiries and investigations, that adequate facilities for making the repairs on the *Venus* were available and by letter dated October 6, 1924 (R-45, 49), requested the Collector to reconsider his decision that the customs duties collected should be refunded. The next day the Auditor requested the Secretary of Finance to remove the matter to the Court of First Instance, as provided in Section 1386 of the Code, should the Collector refuse to reconsider his decision. (R-50) Receiving no response to either letter, the Auditor repeated his request on November 12, 1924, to the Secretary of Finance and on November 14, 1924, addressed a second request to the Collector and enclosed additional evidence to the effect that the repairs could have been made in the Philippine Islands reasonably economically, and within a reasonable time. (R-50-52)

The Auditor received no response to either of these second requests and on November 26, 1924, the Collector presented to the Auditor for countersignature, pursuant to Sections 5 and 614 of the Code, a warrant drawn in favor of the Company for P159,960.00, chargeable to the general and indefinite appropriation made by Act No. 357, as amended, the amount of the refund ordered by the Collector on the protest. The Auditor returned the warrant on November 28, 1924, to the Collector without his countersignature with the

information that the warrant could not be countersigned until his request for reconsideration had been passed upon by the Collector. (R-52, 53) The Collector returned the papers the same day with the statement that he found no justification for reconsideration of his decision. (R-53) The Auditor again returned the warrant to the collector with request that he reconsider his decision that the duties should be refunded (R-53, 57). Before the Auditor had finally concluded whether or not he would countersign the warrant this action was commenced (R-16). The majority and minority opinion of the Court below are contained in the transcript of record (R-61, 130).

THE QUESTIONS PRESENTED

1. Whether the Auditor performs and exercises a mere ministerial duty controllable by mandamus in the audit and settlement of claims and accounts for refund of customs duties approved by the Collector, and in the countersignature of warrants on the Treasury of the Philippine Government for payment of refunds of customs duties or whether such duties of the Auditor are discretionary.

2. Whether the Supreme Court of the Philippine Islands has jurisdiction to require the Auditor, appointed to and holding office at the pleasure of the President of the United States, to approve the decisions of, and to countersign the warrants drawn by, the Collector and chargeable to general and indefinite appropriations in the Insular Treasury for refund of customs duties *erroneously* and *illegally* collected.

3. Whether the laws of the United States confer exclusive jurisdiction and authority on the Collector independently of the Auditor to audit, settle, and al-

low claims for refund of customs duties, and if not, whether the construction of the court below of the laws of the Legislature for the Philippine Islands that all matters of discretion with respect to such claims are confided in the Collector is the correct construction of said laws, and if so, whether such laws are valid.

4. Whether the jurisdiction and authority of the Auditor to settle and adjust all claims for or against the Government for the Philippine Islands or any of its Governmental subdivisions and branches and which settlements are final and conclusive on the executive departments and branches of said Government and its subdivisions and branches include jurisdiction and authority to review the decisions of the Collector on claims for refund of customs duties chargeable to a general and indefinite appropriation for the refund of duties erroneously or illegally collected.

5. Whether the Government of the Philippine Islands is not the real party in interest and a necessary and indispensable party in any proceeding by mandamus against the Auditor to require him to allow a claim for refund of customs duties and to countersign a warrant chargeable to a general and indefinite appropriation in the Insular Treasury in payment of said claim.

6. Whether the Governor General and the Secretary of War as the superior officers of the Auditor are not necessary and indispensable parties in any mandamus proceeding against the Auditor to require him to allow a claim for refund of customs duties and to countersign a warrant in payment thereof.

7. Whether the powers of the Collector in the refund of customs duties when no appeal is taken to the Court

of First Instance as provided in Sections 1383, 1384, and 1386 of the Code are final and conclusive on the Auditor as well as on the claimant.

8. Whether the Supreme Court of the Philippine Islands has jurisdiction to control by mandamus the Auditor in the exercise of his jurisdiction and authority in the audit, settlement, and allowance of claims against the Philippine Government chargeable to appropriations made in general terms for refund of customs duties alleged to have been erroneously or illegally collected.

9. Whether the sole and exclusive remedy of a claimant for refund of customs duties denied by the Auditor is not limited to an appeal to the Governor General and to the Secretary of War or to the Philippine Legislature when appeal to the Court of First Instance is not taken.

10. Whether the Company had a plain, speedy, and adequate remedy at law, in the appeal to the Governor General and Secretary of War as provided in Section 25 of the Act of August 29, 1916, 39 Stat. 554, (hereinafter referred to as the Organic Act).

11. Whether the provisions of Section 24 of the Organic Act that "the decisions of the Auditor shall be final and conclusive upon the Executive branches of the Government" in effect confers jurisdiction upon the Supreme Court for the Philippine Islands to control such decisions by mandamus, and to direct that such decisions be made by the Auditor in a certain and specified way, particularly when payment of the claim must be made from a general and indefinite appropriation for refund of customs duties erroneously or illegally collected.

12. Whether, if the laws confer on the Auditor jur-

isdiction and authority in the audit and settlement of claims and accounts subject to right of appeal to the Governor General and the Secretary of War which are judicial in character, such laws are constitutional.

13. The meaning of the terms "accounts" and "audit" as used in Section 24 of the Organic Act and in the Accounting Law (chapter 26, Administrative Code, as amended by Act No. 3066).

14. Whether the Supreme Court of the Philippine Islands may require by mandamus moneys in general appropriations in the Insular Treasury to be paid to any claimant when neither the United States nor the Legislature for the Philippine Government has consented that the latter Government be sued or proceeded against indirectly in mandamus proceedings.

CONTENTIONS OF THE AUDITOR

The Auditor contends that the court below erred in the following particulars:

1. In assuming jurisdiction of this cause.

2. In concluding that the Company did not have a plain, speedy, and adequate remedy at law.

3. In not holding that the Government of the Philippine Islands was the real party in interest and a necessary and indispensable party.

4. In not holding that the Governor General and the Secretary of War as his superior officers were necessary and indispensable parties.

5. In its construction of the law as to the jurisdiction, authority, and responsibility of the Auditor with respect to claims against the Philippine Government and particularly with respect to the Auditor's exclusive jurisdiction and authority to determine the

availability of the general and indefinite appropriation made by Act No. 357, as amended by Act No. 1515, for refund of custom duties erroneously or illegally collected.

6. In its construction of the law as to the jurisdiction, authority, and responsibility of the Auditor with respect to decisions of the Collector on claims for refund of customs duties, when no appeal from such decisions has been taken to the Courts of First Instance, as provided in Sections 1383, 1384, and 1386 of the Code.

7. In its construction of the law as to the finality of decisions of the Collector on claims for refund of customs duties, in so far as the Auditor is concerned.

8. In considering or passing upon the merits of the Company's claim for refund of customs duties.

9. When having erroneously assumed jurisdiction to pass upon the merits of the Company's claim in considering facts not properly before it.

10. In its construction of the law as to the finality of the decisions of the Auditor on the Executive branches of the Government, including the Collector, who is a subordinate of the Secretary of Finance.

11. In deciding that the duties of the Auditor with respect to claims for refund of customs duties allowed by the Collector and in the countersignature of warrants chargeable to a general and indefinite appropriation in payment thereof are ministerial duties.

12. In deciding that if the law imposed duties judicial in character upon the Auditor, Governor General, and Secretary of War, such laws are unconstitutional.

13. In its construction of the terms "accounts" and "audit" as used in the Accounting Law and in Section 24 of the Organic Act.

14. In its disregard of the following applicable and controlling decisions of the Supreme Court of the United States:

(a) *Gaines* v. *Thompson* (7 Wall. 347), *Lee* v. *Johnson* (116 U. S. 48), and *Orchard* v. *Alexander* (157 U. S. 372), that because duties of executive officers in the administration of the law require in their performance the examination and consideration of evidence and the exercise of judgment thereon, they are none the less executive duties.

(b) *Murray's Lessee et al.* v. *Hoboken Land and Improvement Company* (59 U. S. 272), that administrative duties, such as the auditing of accounts, may involve on the part of an executive officer the exercise of judgment upon both law and fact, may be, in the enlarged sense, judicial acts, but that is not sufficient to bring such matters under the judicial powers.

(c) *Dunlap* v. *Black* (128 U. S. 40) and *Redfield* v. *Window* (137 U. S. 636), that mandamus will lie to compel the performance *only* of duties the performance of which the law requires without further question, but the courts will not interfere by mandamus with the executive officers of the Government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law.

(d) *Brashear* v. *Mason* (6 Howard 92) and *Decatur* v. *Paulding* (14 Peters, 497), that where consent has not been given to sue the Government, moneys to the credit of general appropriations in the Treasury may not be controlled by extraordinary judicial process directed against officers of the Government, the situation with respect to suits against the Government for the Philippine Islands being the same as that existing prior to the creation of the Court of Claims in 1855 for suits against the United States.

(e) *United States* v. *Lynch* (137 U. S. 280), that even after the Government had consented to be sued, the auditors and comptrollers of the United States Treasury may not be controlled by extraordinary judicial process in the settlement of claims and countersignature of warrants chargeable to general appropriations in the United States Treasury, Section 24 of the Organic Act providing that the Auditor, except as to appeal to the Governor General and Secretary of War, shall have "like authority as that conferred by law upon the several auditors of the United States and the Comptroller of the United States Treasury." (The exception referred to is not a limitation of the authority of the auditor, for he, in fact and in law, has greater powers than the former auditors and comptrollers of the United States Treasury.)

(f) *Work* v. *United States, ex rel Rives* (267 U. S. 175), that extraordinary judicial process cannot be invoked to operate as a writ of error to review the discretionary acts of public officers.

(g) *Ekiu* v. *United States* (142 U. S. 161) and *Baltimore and Ohio Railroad* v. *Pitcairn Coal Co.* (215 U. S. 481), that there can be no resort to extraordinary judicial process even in an otherwise proper case until exhaustion of administrative remedies.

(h) *Webster* v. *Fall et al.* (266 U. S. 507), that in any proceeding by extraordinary judicial process against a public officer, the superior of such officer is a necessary and indispensable party. (By Section 24 of the Organic Act the Auditor is "under the general supervision of the Governor General" and his decisions are reviewable by both the Governor General and the Secretary of War.)

(i) *Wells* v. *Roper* (246 U. S. 335) *Louisiana* v. *Mc-*

Adoo (234 U. S. 627), and *Oregon* v. *Hitchcock* (202 U. S. 60), that a proceeding against a public officer concerning public money or property is in essence a proceeding against the Government, which is a necessary and indispensable party, jurisdiction being determined by the real and not by the nominal parties in interest.

ARGUMENT

Introduction

This Court granted April 26, 1926, a writ of certiorari pursuant to Sections 7 and 8 of the Act approved February 13, 1925 (43 Stat. 940), to review the judgment of the Supreme Court of the Philippine Islands entered October 6, 1925, issuing a writ of mandamus against the Auditor requiring him to allow a claim of the Company for refund of customs duties and to countersign a warrant chargeable to a general and indefinite appropriation in payment thereof. The Court also granted a motion to advance this case on its Docket.

As stated in our brief in support of the petition for certiorari (p. 9), this review is not sought in the hope that this Court may find that the Company is not entitled to a refund of the customs duties or that errors were committed in the decision of the lower court on the merits of the Company's claim. Counsel for the Auditor believe that while the court below concerned itself with and passed upon the merits of the Company's claim, such merits were upon no theory of the case properly before said court and that because of insurmountable jurisdictional obstacles which were not met and satisfied in the court below such merits are not properly before this Court. Therefore, the

argument hereinafter made on behalf of the Auditor will not concern itself with the merits of the Company's claim; that is, whether or not facilities were available in the Philippine Islands to make the repairs and reconstruction work on the S. S. *Venus* reasonably economically and within a reasonable time and whether the general and indefinite appropriation for refund of customs duties erroneously and illegally collected was available for refund of the customs duties collected because the repairs on the *Venus* were made in Hongkong instead of in the Philippine Islands.

Points

I.

Where there is no appropriation therefor neither any officer of the Executive Department nor any court has authority to direct payment of a claim against the government, such authority being confided exclusively to the Legislature Department of the Government.

II

Where an appropriation has been made by the Legislative Department of the Government in general terms and indefinite in amount for the payment of claims of a particular class or character, the question whether such appropriation is available for the payment of a particular claim is a discretionary matter not within the jurisdiction or power of the court below.

III

The determination of the availability of the general and indefinite appropriation made by the Philippine

Legislature for the refund of customs duties erroneously or illegally collected is a quasi judicial or discretionary matter within the exclusive jurisdiction of the Auditor. For the court below to attempt to change, control, or disturb, by mandamus, this determination is contrary to the rule established by a long line of decisions of this Court.

IV

The duties of the Auditor for the Philippine Islands in the settlement of claims of a class payable from general appropriations and the counter-signature of warrants therefor are quasi-judicial or discretionary. The attempt of the court below to compel the performance of these duties in a particular manner is in disregard of and contrary to the decisions of this Court.

V

The Supreme Court of the Philippine Islands has no greater jurisdiction in mandamus actions than have the courts of the United States.

VI

The fact that the law imposes duties upon and grants powers to the Auditor, the Governor General and the Secretary of War, which are judicial in character, does not vitiate such laws nor make such duties and powers any the less executive duties and powers.

VII

The jurisdiction of the Collector to settle claims for refund of customs duties is subordinate to that of the Auditor.

VIII

An excellent illustration of this supervisory power and responsibility of the Auditor is found in a recent decision of the highest court of England.

IX

To limit the term "account" as used in the Accounting Law and in Section 24 of the Organic Act to the meaning given it by the court below is contrary to the settled construction of statutes of the United States with which the use of the term is assimilated and would destroy the accounting system created by Congress for the Philippine Islands.

X

To limit the term "audit" as used in the Accounting Law and Section 24 of the Organic Act as was done by the court below denies the Auditor the essential jurisdiction and authority conferred upon him in the Organic Act.

XI

The case of Smith v. Jackson (246 U. S. 338) distinguished.

XII

To grant a writ of mandamus where the law provides a plain, speedy, and adequate remedy is contrary to decisions of this Court.

XIII

The Government for the Philippine Islands is the real party in interest and a necessary and indispensable party.

XIV

The Governor General and the Secretary of War are the superior officers of the Auditor and are indispensable and necessary parties.

Point I

Where there is no appropriation therefor neither any officer of the Executive Department nor any court has any authority to direct payment of a claim against the Government, such authority being confided exclusively to the Legislative Department of the Government.

Both Article I, Section 9, of the Constitution of the United States and Section 3 of the Organic Act of the Philippine Islands provide that no money shall be drawn from either Treasury, respectively, except in pursuance of an appropriation by law; that is, except with the consent of the Legislative Department of the Government. Neither the Executive nor the Judicial Departments of either Government have authority to appropriate money or to take money from the public treasury without the consent of the Legislative Department. The decision of this court in *Reeside* v. *Walker* (11 Howard, 272) is conclusive on this point.

Point II

Where an appropriation has been made by the Legislative Department of the Government in general terms and indefinite in amount for the payment of claims of a particular class or character, the question whether such appropriation is available for the payment of a particular claim is a discretionary matter not within the jurisdiction or power of the court below.

The situation in the Philippine Islands is similar to that existing in the United States prior to the act of February 24, 1855 (10 Stat. 612), establishing the Court of Claims; that is, there is no general provision of law whereby suit may be brought against the Government for the Philippine Islands. During this period, prior to 1855, there were several attempts to secure public money in the United States Treasury by means of extraordinary judicial process against various officers of the Government. Such a case was that of *Brashear* v. *Mason* (6 Howard 92, 100), wherein the Court said:

> "We are also of opinion, that if the plaintiff had made out a title to his pay as an officer of the United States Navy, a mandamus would not lie in the court below to enforce the payment.
>
> "The Constitution provides, that no money shall be drawn from the Treasury but in consequence of appropriations made by law. (A. I, sec. 9). And it is declared by act of Congress (3 Statutes at Large, p. 689, sec. 3), that all moneys appropriated for the use of the War and Navy Departments shall be drawn from the Treasury by warrants of the Secretary of the Treasury, upon the requisitions of the Secretaries of these departments, countersigned by the second comptroller.
>
> "And, by the Act of 1817 (3 Stat. at L., p. 367, secs. 8, 9), it is made the duty of the comptrollers to countersign the warrants only in cases when they shall be warranted by law. * * *
>
> "Formerly, the moneys appropriated for the War and Navy Departments were placed in the Treasury to the credit of the respective Secretaries. That practice has been changed, and all the moneys in the Treasury are in to the credit or in the custody of the Treasurers, and can be drawn out, as we have seen, only on the warrant of the

Secretary of the Treasury, countersigned by the comptroller.

"In the case of *Mrs. Decatur* v. *Paulding* (14 Pet. 497), it was held by this court that a mandamus would not lie from the Circuit Court of this District to the Secretary of the Navy to compel him to pay to the plaintiff a sum of money claimed to be due her as a pension under a resolution of Congress. There was no question as to the amount due, if the plaintiff was properly entitled to the pension; and it was made to appear, in that case, affirmatively, on the application, that the pension fund was ample to satisfy the claim. The fund, also, was under the control of the Secretary, and the moneys payable on his own warrant.

"Still the court refused to inquire into the merits of the claim of Mrs. D. to the pension, or to determine whether it was rightfully withheld or not by the Secretary, on the ground that the court below had no jurisdiction over the case, and, therefore, the question not properly before this court on the writ of error.

"The court say, that the duty required of the Secretary by resolution was to be performed by him as the head of one of the executive departments of the Government, in the ordinary discharge of his official duties; that in general, such duties, whether imposed by act of Congress or by resolution, are not mere ministerial duties; that the head of an executive department of the Government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion; and that the court could not by mandamus act directly upon the officer, and guide and control his judgment or discretion in matters committed to his care in the ordinary discharge of his official duties.

"The court distinguished the case from *Kendall* v. *The United States* (12 Pet. 524), where

there was a mandamus to enforce the performance of a mere ministerial act, not involving, on the part of the officer, the exercise of any judgment or discretion.

"The principle of the case of Mrs. Decatur is decisive of the present one. The facts here are much stronger to illustrate the inconvenience and unfitness of the remedy.

"Besides the duty of inquiring into and ascertaining the rate of compensation that may be due to the officers, under the laws of Congress, no payment can be made unless there has been an appropriation for the purpose. And if made, it may have become already exhausted, or prior requisitions may have been issued sufficient to exhaust it.

"The Secretary is obliged to inquire into the condition of the fund, and the claims already charged upon it, in order to ascertain if there is money enough to pay all the accruing demands, and if not enough, how it shall be apportioned among the parties entitled to it.

"These are important duties, calling for the exercise of judgment and discretion on the part of the officer, and in which the general creditors of the Government, to the payment of whose demands the particular fund is applicable, are interested, as well as the Government itself. At most, the Secretary is but a trustee of the fund for the benefit of all those who have claims chargeable upon it, and, like other trustees, is bound to administer it with a view to the rights and interests of all concerned.

"It will not do to say, that the result of the proceeding by mandamus would show the title of the relator to his pay, the amount, and whether there were any moneys in the Treasury applicable to the demand; for, upon this ground, any creditor of the Government would be enabled to enforce his claim against it, through the head of the proper department, by means of this writ, and

> the proceeding by mandamus would become as common, in the enforcement of demands upon the Government, as the action of assumpsit to enforce like demands against individuals."

In addition to *Decatur* v. *Paulding*, referred to in the above quotation from *Brashear* v. *Mason*, there were similar holdings in *United States* v. *Guthrie* (17 Howard 284), *Reeside* v. *Walker, supra*, and *Case* v. *Terrell* (11 Wall. 199). It is to be noted further that in the *Walker case* the claim had been established by a decision of a court, whereas in this case the claim had not been so established.

The court below apparently either was not aware of these decisions or failed to comprehend their significance, when stating (R., p. 84):

> "To show that mandamus will not lie, the answer alleges that the money so paid under protest has since been converted into the Government's Treasury, and hence is now beyond the reach of the courts. There is no merit in that contention, and it was not relied upon in argument. The answer also alleges: 'To meet refunds of customs duties or taxes erroneously and illegally collected by the Philippine Government, permanent annual appropriations are provided by Act No. 357, as amended by Act No. 515.' This provision is in the nature of a permanent and continuous appropriation for the payment of claims like the one in question."

This language would indicate that the court below considered it had ample jurisdiction to direct the payment of a claim against the Government out of an appropriation made in general and indefinite terms. In any event, such is the result of the judgment below and

same is clearly contrary to the *Decatur, Brashear, Guthrie,* and *Reeside cases, supra.*

Neither these cases nor the instant case are to be confused with such cases as *Smith* v. *Jackson* (246 U. S. 388), *United States* v. *MacVeagh* (214 U. S. 124), or *Houston* v. *Ormes* (252 U. S. 469). These cases are hereinafter distinguished (pp. 69, 73) and it is sufficient to state here that same arose after the establishment of the Court of Claims in 1855 and all represent instances where Congress had either appropriated a specific sum to pay a specific salary, as in the *Jackson case,* or had appropriated specific sums to pay specific claims as in the *MacVeagh* and *Ormes cases.* Such is not the situation here, for, as in the *Brashear case,* a general sum had been appropriated to pay a specific class of claims.

Point III

The determination of the availability of the general and indefinite appropriation made by the Philippine Legislature for the refund of customs duties erroneously or illegally collected is a quasi-judicial or discretionary matter within the exclusive jurisdiction of the Auditor. For the court below to attempt to change, control, or disturb by mandamus this determination is contrary to the rule established by a long line of decisions of this court.

Section 24 of the Organic Act (39 Stat. 554) provides that the Auditor "shall have like authority as that conferred by law upon the several auditors of the United States and the Comptroller of the United States Treasury," except that there is an administrative appeal from his decisions to the Gov-

ernor General and the Secretary of War. The authority then conferred upon the auditors and comptroller of the Treasury was that stated in the Dockery Act of July 31, 1894 (28 Stat. 205, 211), and was of great antiquity. These officers had been continued in existence since the Ordinance of Septembr 26, 1778, of the Continental Congress (Vol. XII, Journals, Continental Congress, pp. 956, 961), by the acts of September 2, 1789 (1 Stat. 65), March 3, 1817 (3 Stat. 366), and July 31, 1894, *supra*, and similar officers were found in the Governments of the Thirteen Colonies as shown by the references collected in the margin.[1]

[1] See Articles XXII and XXIX of the Constitution of South Carolina of 1778: *Poore* "Colonial Constitutions" II 1617, 1625. Article 7 of the Constitution of Delaware of 1776: *Poore* I 274, provided that the governor who was elected by the joint vote of the two houses "may draw for such sums of money as shall be appropriated by the General Assembly and be accountable to them for the same." Article X of the Constitution of Maryland of 1776: *Poore* I 822: provided that the "House of Delegates may examine and pass all accounts of the state relating either to the collection or expenditure of the revenue or appoint auditors to state and adjust same." Article XI of the Constitution of Massachusetts provided that "No money shall be issued out of the treaury of this commonwealth and disposed of (except such sums as may be appropriated for the redemption of credit or treasurer's notes or interest arising thereon) but by warrant under the hand of the Governor for the time being, by and with the advice and consent of the council and agreeably to the acts and resolves of the General Court." The council was elected by and composed of members of the General Court.

Article XLIV of the Constitution of Vermont of 1777: *Poore* II 1865: provided for a council of censors composed of members of the general assembly to assist the governor and to determine, among other things, "in what manner the public moneys have been disposed of, and whether the laws have been duly executed." The constitution of New Hampshire of 1781: *Poore* II 1290: provided for an auditing committee consisting of two members of the upper and three members of the lower house and prohibited the treasurer from paying out any money "but by warrant under the hand of the governor for the time being and with the advice and consent" of the auditing committee in accordance with law. Article XXII of the Constitution of New York of 1777: *Poore* II 1336: required the legislature to appoint the treasurer, as did most all of the other state constitutions of the period, and the practice

As pointed out in the *Brashear case, supra,* the Comptroller of the Treasury was required to countersign all warrants drawing money from appropriations in the Treasury for the reason, as stated by Alexander Hamilton,[2] "the comptroller is a check on the Secretary" as to the legality of an expenditure from an appropriation. Such requirement is now found in Section 11 of the Act of July 31, 1894, and the Legislature of the Philippine Islands made detailed provi-

[2]Hamilton's Works, Vol. VII, p. 548, quoted by Comptroller Lawrence, Vol. II, First Comptroller of Treasury's Decisions, 382, 390. Secretary of the Treasury Sherman said that "A Secretary of the Treasury would not even mention the subject of a claim to an auditor or a comptroller. If he should do so he would show his utter unfitness for the office. No man who ever held that office would do a thing of that kind. It would be in the nature of a criminal act for him to attempt to influence his subordinates." (Page 33, Accounting System of the United States Treasury Department, 1905.)

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seems to have been to appoint a committee of the legislature to audit the accounts of the treasurer. See Article XII of the Constitution of New Jersey of 1776: *Poore* II 1312. Article XIX of the Constitution of North Carolina of 1776: *Poore* II 1413: authorized the governor "to draw for and apply such sums of money as shall be authorized by the general assembly for the contingencies of the government and be accountable to them for the same."

Article XI of the Pennsylvania charter of 1683: *Poore* II 1524: provided that the governor and the provincial council, elected by the people, should at all times "have power to inspect the management of the public treasury and punish those who shall convert any part thereof to any other use than what has been agreed upon by the governor, provincial council and general assembly." The Pennsylvania constitutions of 1776 and 1778 contained substantially similar provisions: *Poore* II 1583. The House of Burgesses of Colonial Virginia had pronounced control over the public money of that colony. For instance, by acts of March, 1756, 29th George II, September, 1758, 32nd George II and November, 1761, 2 George III: 7 Henning, Va., Statutes at Large, 33, 243, and 467: it was provided: "That from and after the passing of this act, John Robinson, esquire, shall be and he is hereby nominated, constituted and appointed Treasurer of the revenue arising from the duties laid by the before recited act of assembly and of all other public money for public uses, by virtue of any other act or acts of assembly. To hold the said office so long as he shall continue speaker of the house of burgesses, and from the time of his being out of said office to the end of the next session of the assembly. * * * And he shall be accountable for the

sions for its exercise by the Auditor in Section 621 of the Code, which provided that:

> "No Insular warrant shall be paid by the Treasurer until countersigned by the Auditor or by an Officer of the Bureau of Audits thereunto authorized in writing by him."

The Court of Claims very pertinently said in *Geddes* v. *United States* (38 Ct. Cls. 428), at page 444, that:

> "The accounting officers are the guardians of the appropriations. It is their business to see that

said money to the general assembly." All other officers were required to account to the treasurer. See act of 1758, 32nd George II. The offices of treasurer and speaker of the house of burgesses were separated by the act of November, 1766, 7th George III, and one Nicholas was appointed by the general assembly with substantially the same powers. This statute, like that of Parliament, provided: "That Lewis Burswell, George Wythe, John Blair, the younger, John Randolph, and Benjamin Waller, esquires [all members of the general assembly], or any three of them, be, and they are hereby appointed a committee to examine, in the months of June and December, in each year, into the state of the treasury; and the said treasurer is hereby required to lay before the said committee all of the accounts of the treasury [which he was required by section iv to keep in detail], and produce the money in his hands, * * * and the committee shall certify the same to the next meeting of the assembly:" 7 Henning 210. See also acts of November, 1769, 10th George III, and February, 1772, 12th George III; 8 Henning 395, 588: continuing the provisions of the act of 1776. See also act of 1775: 9 Henning 16, 64 and 71.

The constitution adopted June 27, 1776, for Virginia provided in Article XIX that, "A treasurer shall be appointed annually by joint ballot of both houses:" 9 Henning 118. By act of October, 1776, it was recited that "the accounts of the treasurer have been examined and passed by the general assembly to the 19th day of October last past." This same statute provided for a committee of the general assembly to audit the public accounts from time to time and by act of a few days later, amended by the act of October, 1778: 9 Henning 245, 536, a board of auditors appointed by the general assembly and removable only by them was created to audit the public accounts and no money could be drawn from the treasury save on warrants countersigned by the auditors. This accounting system had more drastic powers than have ever been surrendered by the Congress of the United States to the accounting officers of the United States.

no money is paid out of the Treasury unless the payment is authorized by an appropriation act. It is not their business to adjudicate abstract questions of legal right beyond the legal right of a person to be paid out of a specific appropriation. An appropriation constitutes the means for discharging the legal debts to the Government.

"The judgment of a court has nothing to do with the means—with the remedy for satisfying a judgment. It is the business of courts to render judgments, leaving to Congress and the executive officers the duty of satisfying them."

As stated in *Case* v. *Terrell, supra,* it is a fundamental principle of jurisprudence that a judgment cannot be rendered against a person not a party to a suit; when the Government has not consented to be sued, as is the case in the Philippine Islands, and the Auditor has denied the use of a general appropriation, as in this case, for the payment of a particular claim, the only remedy of an aggrieved claimant, other than the appeal provided in Section 25 of the Organic Act, is that pointed out in the *Reeside case, supra;* that is, in an appeal to the legislature for a specific appropriation, which, of course, is subject to the veto power of the Governor General.

It has been a uniform principle of the accounting system of the United States that the payment of claims should be by the accounting officers and not by the officers incurring or initially approving such claims. Secretary of the Treasury Woodbury in a report to the Senate dated December 5, 1834 (republished in 26 Congressional Record, 4305), said:

"It seems required, by a due regard to system, uniformity, and proper accountability, that

> neither those empowered by law to decide on the necessity of certain services and purchases nor those who make the purchases and contracts should also adjust the accounts rendered for them; but that the auditors themselves, whether the claims originate under the authority of the heads of bureaus or of Departments, should have the exclusive power, in the first instance, to judge of the reasonableness and just amount due, looking to all the evidence in the case, and to the laws and fixed prospective regulations that apply to it."

The House Committee on Revision of the Laws unfavorably reported February 16, 1869 (republished in 26 Congressional Record, 4342), a recommendation that the accounting act of March 3, 1817, as amended by the act of March 30, 1868 (15 Stat. 54), be modified, and said, among other things, that:

> "* * * power in the head of the War or any other Department to set aside and change the findings of the accounting officers of the Government is at war with the whole principle upon which the system is based; that the allowance and settlement of the disbursement of all public funds should be vested wholly in a set of officers other and different from those who made the expenditure. If their allowances and settlements can be set aside and changed by the head of the Department under whose direction the money was paid, or the claim accrued, then the whole system of checks to improper expenditures, which it was supposed had been established, falls to the ground."

Thus it was that Ex-President and now Chief Justice Taft could properly and accurately state at page

81 of his book on *Our Chief Magistrate and His Powers,* with respect to the discretion of the Comptroller of the Treasury under the Dockery Act of July 31, 1894, *supra,* that:

> "Then consider the drawing of money from the Treasury Department under an appropriation act. The drawing of the warrant must be approved by the Comptroller of the Treasury. It is for him to say how the appropriation act shall be construed and whether the warrant is lawful and whether the money can be drawn. The Comptroller of the Treasury is an appointee of the President, and in a general sense is his subordinate. If the President does not like him as a Comptroller, he can remove him and with the consent of the Senate put in another one, but under the act of Congress creating the office, the President cannot control or revise the decisions of this officer. His work is like the work I have referred to, quasi-judicial. If the claim is rejected by him, the claimant may in some cases carry his claim into the Court of Claims, but if he decides for the claimant, the public and those interested in maintaining the side of the Government have no appeal, and his decision is final."

and at page 125, that:

> "Congress may repose discretion in appointees of the President, which the President may not himself control. The instance I have already given is one of these, in which the Comptroller of the Treasury has independent quasi-judicial authority to pass on the question of what warrants are authorized by appropriation acts to be drawn by him on the funds of the Treasury. The President can appoint him and remove him, but may not control his construction of appropriation acts

and his signing, or withholding his signature from warrants in accordance with that construction."

There is no short cut to the obtaining of public money in the United States Treasury through extraordinary judicial proceedings against the Comptroller of the Treasury, now the Comptroller General, unless, of course, he should refuse to allow a claim and countersign a warrant where Congress had itself adjudicated the claim and had made a specific appropriation for its payment as in the McVeagh case, *supra*. The remedy of an aggrieved claimant was pointed out as early as 1823, by Attorney General Wirt (1 Opins. Atty. Gen. 624, 629); that is, in an appeal to Congress for a specific appropriation or, since 1855, to the courts for a judgment, but that judgment except in a limited number of cases must be specifically reported to Congress and an appropriation made before same may be paid. Act September 30, 1890. (26 Stat. 537.)[3]

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[3]An able discussion of administrative discretion in the matter of expenditures of appropriated moneys under our system of Government is contained in President Taft's Commission on Economy and Efficiency Report (H. R. Document, 854, 62d Congress, 2nd Session, pp. 64-78). It is there said (p. 74), among other things, that:

"The Revised Statutes (sec. 3678) provide that—

"'All sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made and for no others.'

"The object of an appropriation is thus fixed by the terms of the appropriation, and the proper construction of these terms is a question of law. The construction to be placed on each appropriation has, however, been taken away from the heads of departments.

"The law provides, as has been said, that the accounts of expenditures under all appropriations shall be examined by one auditor, and, on appeal, by the Comptroller of the Treasury. To give to the heads of departments the right to have the law construed before action thereunder, the Dockery Act provided that—

"Disbursing officers or the head of any executive department or other establishment not under any of the executive departments may

See, however, *United States* v. *Babcock* (250 U. S. 328), where no such appeal to the courts could be taken.

Mandamus cannot be used as such a short cut, for this Court cogently stated in *United States* v. *Guthrie* (17 Howard 284), at page 303, that:

> "The only legitimate inquiry for our determination upon the case before us is this: Whether, under the organization of the Federal Government, or by any known principle of law, there can be asserted a power in the Circuit Court of the United States for the District of Columbia, or in this court, to command the withdrawal of a sum or sums of money from the treasury of the United States, to be applied in satisfaction of disputed or controverted claims against the United States? This is the question, the very question presented for our determination; and its simple statement would seem to carry with it the most starting considerations—nay, its unavoidable negation, unless this should be prevented by some positive and controlling command; for *it would occur, a priori, to every mind, that a treasury, not fenced round or shielded by fixed and established modes and rules of administration, but which could be subjected to any number or description of demands, asserted and sustained through the undefined and undefinable discretion of the courts, would constitute a feeble and inadequate provision for the great and inevitable necessities of the nation. The government under such a regime, or, rather, under such an absence*

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apply for and the Comptroller of the Treasury shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered shall govern the Auditor and the Comptroller of the Treasury in passing upon the account containing said disbursement. (Act of July 31, 1894, 28 Stat. 208.)

"These provisions of law necessarily limit the discretion of those having the disposition of appropriations which certainly, so far as the law is concerned, is subject to the control of the accounting officers of the Treasury."

of all rule, would, if practicable at all, be administered not by the great departments ordained by the constitution and laws, and guided by the modes therein prescribed, but by the uncertain, and perhaps contradictory action of the courts, in the enforcement of their views of private interests." (Italics supplied.)

Even since the United States has consented to be sued, it has been determined that mandamus against the auditors and comptrollers of the Treasury may not be used as such a short cut to the public funds in payment of a disputed claim. *United States* v. *Lynch* (137 U. S. 280). This is necessarily true for the following reasons:

Prior to the establishment of the Court of Claims in 1855, the decisions of the accounting officers were conclusive as to the merits of a claim, subject only to an appeal to certain specified administrative officers or to the Congress. Since that date their decisions are conclusive on the executive branches of the Government in all cases (Act of March 30, 1868, 15 Stat. 54, Section 191, Revised Statutes, Section 305 of the Act of June 10, 1921, 42 Stat. 24), subject only in certain specified cases to administrative appeal, and are conclusive upon the courts with respect to the availability of general appropriations in the Treasury; that is, as to the method of payment, for even after judgment by a court, the money to pay same must be specifically appropriated. Such decisions are reviewable by the courts only in the cases and in the courts and in the manner provided by statute. Mandamus is not the method authorized in this class of cases under the laws applicable to the Philippine Islands.

Since the Auditor with respect to general appro-

priations of the Philippine Government has even greater jurisdiction than the accounting officers of the United States have with respect to general appropriations in the United States Treasury, and since no such jurisdiction as has been assumed in this case ever has been conferred upon the courts of the Philippine Islands over the subject-matter of claims against the Philippine Government, nor (as will be hereinafter shown) to control by mandamus the Auditor in the performance of his discretionary duties in the settlement of claims and the countersignature of warrants in payment thereof, it would appear necessarily to follow that the judgment below is not only erroneous and in conflict with a long line of decisions of this Court, but if permitted to stand will seriously disrupt the system of Government for the said Islands as established by the laws of the United States.

Point IV

The duties of the Auditor for the Philippine Islands in the settlement of claims of a class payable from general appropriations and the countersignature of warrants therefor are quasi-judicial or discretionary. The attempt of the court below to compel the performance of these duties in a particular manner is in disregard of and contrary to the decisions of this Court.

The duties of the Auditor to "examine, audit and settle all accounts pertaining to the revenues and receipts from whatever source of the Philippine Government" and "to audit, in accordance with laws and administrative regulations, all expenditure of funds or property pertaining to or held in trust by the Government," and "to communicate directly with any per-

son having claims before him for settlement" and to "*perform a like duty with respect to all government branches*" and with "like authority as that conferred by law upon the several auditors of the United States and the Comptroller of the United States Treasury" as specifically provided in Section 24 of the Organic Act are discretionary duties and comprehend the accounts of the Collector equally with accounts of all other branches of the Philippine Government.

Such duties are more discretionary than the duties conferred on the Secretary of the Interior by the Dent Act of March 2, 1919 (40 Stat. 1274), considered by this Court in *Work* v. *United States, ex rel Rives* (267 U. S. 175), for the Auditor of the Treasury for the Interior Department and the Comptroller of the Treasury were required under Section 236, Revised Statutes, and Section 11 of the Act of July 31, 1894 (28 Stat. 209), to audit and settle the claim after the Secretary of the Interior had made an allowance and to determine whether to countersign warrants in payment of any such claim. 27 Comp. Dec. 415. The theory underlying the express terms of the law is that stated by Postmaster General Kendall in his annual report of December 4, 1835, recommending an independent audit by the auditors and comptrollers of the Treasury of the transactions of the Post Office Department and which audit was established by the Act of July 2, 1836 (5 Stat. 80), in accordance with such recommendation. He said, among other things, that:

> "• • • It is believed to be a sound principle, that public officers, who have an agency in originating accounts should have none in their settle-

ment. The War and Navy Departments are in general organized upon this principle * * * If from any cause an illegal expenditure be directed by the head of a Department, it is the duty of the disbursing agent not to pay the money; and if he does pay it, *it is the duty of the Auditors and Comptrollers to reject the item in the settlement of his account.* * * *" (Quoted 1 Law. Comp. Dec. 527.)

Furthermore, it had been held in the *Brashear* v. *Mason*, *Decatur* v. *Paulding*, and *United States* v. *Guthrie cases* that the first step in the process of determining the validity of a claim against the United States and the availability of an appropriation to pay same—that is, the action of the administrative executive officers—was discretionary and not controllable by mandamus. It would appear to be beyond question that the next step in the process—that is, the audit and settlement of the claim by the auditors and comptrollers and the final determination of the availability of an appropriation to pay the same (Act March 30, 1868, 15 Stat. 54, *In Re Reference*, 59 Ct. Cls. 813)—is discretionary.

The settlement of all claims against the Government for the Philippine Islands and the determination of availability of general appropriations with which to pay same being clearly a semi-judicial and discretionary jurisdiction and authority in the Auditor, mandamus cannot be used to require him to allow a claim payable therefrom and to countersign a warrant for the payment thereof. This Court said in *United States* v. *Lamont* (155 U. S. 303), at page 308, that:

"The duty to be enforced by mandamus must not only be merely ministerial, but it must be a

duty which exists at the time when the application for the mandamus is made. Thus in the case of *Ex parte Rowland*, 104 U. S. 604, 612, this court, speaking through Mr. Chief Justice Waite, said: 'It is settled that more cannot be required of a public officer by mandamus than the law has made it his duty to do. The object of the writ is to enforce the performance of an existing duty, not to create a new one.'

"Moreover, the obligation must be both peremptory, and plainly defined. The law must not only authorize the act, *Commonwealth* v. *Boutwell*, 13 Wall. 526, but it must *require* the act to be done. 'A mandamus will not lie against the Secretary of the Treasury unless the laws require him to do what he is asked in the petition to be made to do.' *Reeside* v. *Walker*, 11 How. 272; see also *Secretary* v. *McGarrahan*, 9 Wall. 298; and the duty must be 'clear and indisputable.' *Knox County Commissioners* v. *Aspinwall*, 24 How. 376."

Moreover, Section 5 of the Administrative Code for the Philippine Islands, 1917, expressly provides that:

"The exercise of the permissive powers of all executive or administrative officers and bodies is based upon discretion, and when such officer or body is given authority to do any act but not required to do such act, the doing of the same shall be dependent on a sound discretion to be exercised for the good of the service and benefit of the public, whether so expressed in the statute giving the authority or not."

Even were the question an original one this law is conclusive that the Auditor performs discretionary duties in the settlement of claims for refund of customs duties and in the countersignature of warrants chargeable to general appropriations for the payment

of such claims. Under the unanimous decisions of this Court, commencing with *Marbury* v. *Madison* (1 Cranch 137), mandamus cannot be issued to control him in such discretionary action regardless of whether he erred therein. As said in *Riverside Oil Company* v. *Hitchcock* (190 U. S. 316):

> "Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law [and the facts] was, and the courts have no power whatever under these circumstances to review his determination by mandamus or injunction."

So here, the acts of Congress establishing the office of Auditor for the Philippine Islands defined the duties of such office in a manner to leave no other reasonable conclusion than that they are discretionary in character, and the legislature of the Philippine Government has made express provision to like effect.

Point V

The Supreme Court of the Philippine Islands has no greater jurisdiction in mandamus than have the courts of the United States.

Section 9 of the Act of July 1, 1902 (32 Stat. 691, 695), to temporarily provide for the government of the Philippine Islands, provided that "the Supreme Court and the Courts of First Instance of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided and such additional jurisdiction as shall hereafter be prescribed by the Government of said Islands, subject to the power of said

government to change the practice and method of procedure." Section 26 of the Organic Act provides that the Supreme Court of the Philippine Islands "shall possess and exercise jurisdiction as heretofore provided and such additional jurisdiction as shall hereafter be prescribed by law."

The Spooner Amendment of March 2, 1901 (31 Stat. 910), provided that "All military, civil and judicial powers necessary to govern the Philippine Islands" shall, until otherwise provided by Congress, "be vested in such persons and shall be exercised in such manner as the President of the United States shall direct." His directions are contained in Section 515 of Laws of United States Philippine Commission (House Document No. 11, 57th Congress, 1st Session, 1901-1902), as follows:

> "* * * The Supreme Court shall have concurrent jurisdiction with the Courts of First Instance in all cases where an inferior tribunal, corporation, board, or person unlawfully neglects the performance of an act which the law specially enjoins as a duty resulting from an office of trust or station, or unlawfully excludes the plaintiff from the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully excluded by such inferior tribunal, corporation, board, or person, and also shall have original jurisdiction over Courts of First Instance and Judges thereof wherever said Court or Judge unlawfully neglects the performance of a duty which is imposed upon such Court or Judge. The procedure of the Supreme Court in mandamus proceedings shall be the same as those provided for mandate in Sections 222, 223, 224, and 225 of this Code."

The foregoing defines the jurisdiction of the Supreme Court of the Philippine Islands, but confers no greater jurisdiction for the issuance of writs of mandamus than has been conferred upon courts of the United States, and it needs no argument to demonstrate that the latter have never had jurisdiction for the issuance of writs of mandamus to require the performance of discretionary acts in a particular manner.

Point VI

The fact that the law imposes duties upon and grants powers to the Auditor, the Governor General and the Secretary of War, which are judicial in character, does not vitiate such laws nor make such duties and powers any the less executive duties and powers.

The Court said in this regard in *Orchard* v. *Alexander* (157 U. S. 372, 378):

> "Stress is laid upon the words 'executive duties,' as though the approval of the evidence of settlement and improvement was not an executive duty, but a purely judicial act. This is a mistake. True, it involves the weighing of testimony and the exercise of judgment, but equally so do many administrative acts. * * * The approval of the evidence offered in respect to settlement and improvement is only quasi-judicial. It is as much an administrative as a judicial act."

Again this Court most pertinently stated in *Murray's Lessee et al.* v. *Hoboken Land and Improvement Company* (59 U. S. 272, 275, 280):

> "It must be admitted that, if the auditing of this account, and the ascertainment of its balance,

and the issuing of this process, was an exercise of the judicial power of the United States, the proceeding was void; for the officers who performed these acts could exercise no part of that judicial power. They neither constituted a court of the United States, nor were they (first auditor, first comptroller, and solicitor of the Treasury), or either of them, so connected with any such court as to perform even any ministerial duties which arise out of judicial proceedings.

* * * * * * * *

"That the auditing of the accounts of a receiver of public moneys (collector of customs) may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. * * * But it is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact. *United States* v. *Ferreira*, 13 How. 40."

An excellent discussion of this question by Secretary of the Interior Lamar (March 12, 1897) is found in the Pueblo of San Francisco case (5 Land. Dec. 483, 494), in which he said:

"There seems to be some misapprehension as to the meaning of the term 'executive duty.' The executive duties of any one of the Departments are such as are required of its officers in the administration of the law upon the subjects under its jurisdiction. They are not the less executive duties because they require in their performance the examination of evidence and the exercise of judgment thereon. All executive duties which are anything beyond the performance of ministerial acts, involve the exercise of judgment, such as

> an examination, decision and final judgment, but they are not judicial acts in the sense that they can only be the subject of review by judicial tribunals or upon a formal appeal to some higher judicial authority. There is hardly an act of any moment performed in an executive Department which would not, if such were the case, be taken from the supervision and control of its head."

Even if the matter was originally doubtful, its constitutionality has been settled by a hitherto unquestioned practice and construction to the contrary during the entire history of the United States. The powers of the Auditor in this case are no greater than those brought over from the Ordinance of September 26, 1778, *supra*, and conferred by the Act of September 2, 1789 (1 Stat. 65), on the Auditor and Comptroller of the Treasury and which were continued undiminished in the act of July 31, 1894, at the time the Organic Act created the office of Auditor for the Philippine Islands. See *Soule* v. *United States* (100 U. S. 8); *United States* v. *Babcock* (250 U. S. 328).

Point VII

The jurisdiction of the Collector to settle claims for refund of customs duties is subordinate to that of the Auditor.

Section 24 of the Organic Act expressly provides that the Auditor "shall examine, audit and settle all accounts pertaining to the revenues and receipts from whatever source of the Philippine Government," and "audit, in accordance with laws and administrative regulations, all expenditures of funds," and that the Auditor is authorized "to communicate directly with any person having claims before him for settlement,"

the last clause showing clearly that his "audit" of expenditure includes "settlement" of claims.

That the jurisdiction of the Auditor in the performance of the foregoing duties applies to the actions of the Collector clearly is shown by the further provision of the foregoing section that the Auditor "shall perform a like duty with respect to all Government branches." That the jurisdiction of the Collector (considered by this Court in *Gsell* v. *Insular Customs Collector*) (239 U. S. 93), to allow claims for refund of custom duties payable from general appropriations in the Philippine Treasury is subordinate to that of the Auditor is shown by the further provision of said foregoing section that the decision of the Auditor "shall be final and conclusive on the executive branches of the Government."

Section 614 of the Code provides that "Insular revenue and trust funds shall not be withdrawn from the Insular Treasury except upon warrant," and Section 621 provides that:

> "No Insular warrant shall be paid by the Treasurer until countersigned by the Auditor or by an Officer of the Bureau of Audits thereunto authorized in writing by him."

While warrants may be drawn under Sections 616 and 1301 of the Code by the Collector for refund of customs duties, such warrants cannot be paid until the countersignature of the Auditor has been first had and obtained.

Thus it is that the accounts of or claims allowed by the Collector are required to be audited and settled by the Auditor and the warrants signed by the Collector for refunds of duties are valueless until countersigned

by the Auditor, and in both instances the plain and unambiguous terms of the statute make the Auditor's decisions final and conclusive on the Collector. We respectfully submit that it is difficult to conceive upon what theory all discretion is confined to the Collector and that the Auditor's duties in the premises are merely ministerial.

The provision of Act No. 355 of the Philippine Commission in 1902 authorizing an appeal from the decision of the Collector to the Court of Customs Appeal, changed in 1905 by Act No. 1405 to authorize such appeal to a Court of First Instance, and now carried in Sections 1383 and 1384 of the Code, in nowise affects the jurisdiction of the Auditor over the allowance of claims by an executive branch of the Government. In the Organic Act the Congress provided:

> "The laws now in force in the Philippine Islands shall continue in force and effect, except as altered, amended, or modified herein, until altered, amended, or repealed by the legislative authority herein provided or by Act of Congress of the United States." (Section 6.)

> "The legislative authority herein provided shall have power when not inconsistent with this Act, by due enactment to amend, alter, modify, or appeal any law, civil or criminal, continued in force by this Act as it may from time to time see fit." (Section 7.)

Thus the above provisions relating to appeal from the decision of the Collector, whether considered as in force at the time of the enactment of the Organic Act, or as amended, altered, or modified by the Philippine Legislature since that time, must square with

the provisions of the Organic Act, else they must fall. To construe them as carving out of all the claims against the Philippine Government a class of claims over which the Auditor has no control and concerning which he has merely a ministerial duty to perform, as the court below did construe them in this case, is to fly in the face of the express provisions of the Organic Act in defining the powers and duties of the Auditor, and providing that "he shall perform a like duty with respect to all Government branches."

A construction consistent with the provisions of the Organic Act and one that gives full effect to the provisions of the Tariff Law and the Code is the one to be sought, and its discovery presents no difficulty. Such a construction is that the Congress and the Philippine Legislature have consented that the Philippine Government may be sued in the Courts of First Instance, with an appeal therefrom to the Supreme Court of the Philippine Islands, on a claim for refund of customs duties, which claim has been passed upon by the Collector, when, *and only when,* the suit is commenced by way of appeal from the decision of the Collector, either by an aggrieved claimant or by the head of the Department (Secretary of Finance) on behalf of the Government, and when such appeal is taken within fifteen days after notice of the decision of the Collector. Thus when a suit is so commenced, and in no other manner is a suit on such a claim against the Government authorized, the determination of the validity of the claim is transferred from the jurisdiction of the Executive Department of the Government to that of the Judicial Department, over which the Auditor neither has nor claims any control. The decision of the court in such a case is a judgment,

not reviewable except by the Supreme Court, and payable out of the general and indefinite appropriation made by Act No. 357 of the Philippine Commission.

On the other hand, where such a claim is passed upon by the Collector but no appeal is taken from his decision as provided above, that is, no suit is commenced in the Court of First Instance in the manner and within the time provided as set forth above, the claim remains within the jurisdiction of the Executive Branch of the Government, and the decision of the Collector thereon, being the decision of an officer of the Executive Branch of the Government, is reviewable by the Auditor as are such decisions of the officers of all the executive branches, and is final and conclusive, except for the appeal to the Governor General and the Secretary of War provided by Section 25 of the Organic Act.

It is not reasonable to conclude that it was intended to confer on the Collector jurisdiction and authority largely in excess of that possessed at any time by collectors of customs in the United States. There has been no time in the entire history of the United States when the collector of customs could settle claims against an importer for customs duties or against the Government for refund thereof independently of the auditors and comptrollers of the Treasury. The original act of September 2, 1789, *supra*, provided that the auditor and comptroller should audit and settle claims and accounts relating both to *collections* and expenditures of money. The act of March 3, 1817 (3 Stat. 366), made such the duty of the First Auditor and the First Comptroller of the Treasury. The act of March 3, 1849 (9 Stat. 395), created

a Third Comptroller to take over such of the duties of the First Comptroller as related to customs accounts. The first paragraph of Section 7 of the Act of July 31, 1894 (28 Stat. 206), transferred to the Auditor for the Treasury Department the duty residing in the First Auditor to audit and settle "all accounts relating to the customs service." Furthermore, alongside of this audit and settlement of customs accounts by the auditors and comptrollers of the Treasury was an administrative audit of the accounts of the collectors. The act of March 2, 1799 (1 Stat. 642), which was carried into the Revised Statutes as Section 2626, quoted in the margin,[4] created Naval Officers. The title of these officers was changed by Section 523 of the Tariff Act of September 21, 1922 (42 Stat. 974), to Comptrollers of Customs and it was and is their duty to audit and check the accounts of the collector before any duties are collected or refunded and before the accounts reach the Auditor of the Treasury for settlement.

As hereinafter shown (p. 65), the Auditor did check and audit the account and approved the proposed assessment in this case before the duties were collected. This is in accordance with the century-old procedure in the United States and we contend that the Organic Act intended to and does confer on the Auditor like authority to audit and settle any claim for

[4] Sec. 2626. At ports to which there are appointed a collector, naval officer, and surveyor, it shall be the duty of the naval officer—

First. To receive copies of all manifests and entries.

Second. To estimate, together with the collector, the duties on all merchandise subject to duty, and no duties shall be received without such estimates.

Third. To keep a separate record of such estimates.

Fourth. To countersign all permits, clearances, certificates, debentures, and other documents, to be granted by the collector.

Fifth. To examine the collector's abstracts of duties, and other accounts of receipts, bonds, and expenditures, and certify the same if found right.

refund of customs duties which the Collector may approve.

Another analogy for the jurisdiction and authority which we claim for the Auditor over the Collector's decisions exists in the United States in the disposal of public land. Here we find the situation where the Act of July 1, 1864 (13 Stat. 332), provided that patent should issue to the entryman upon the approval of the survey by the Commissioner of the General Land Office. The Revised Statutes subsequently adopted gave the Secretary of the Interior general supervision over all such matters, without, however, repealing the former Act. Concerning this situation, Secretary and later Justice Lamar pertinently stated in his decision in the Pueblo of San Francisco case, *supra*, that:

> "The language of the act of July 1, 1864, (13 Stat. 332) which provides for the issue of a patent after the approval of the survey by the Commissioner of the General Land Office, is to be read in connection with the Revised Statutes subsequently adopted, placing all the business relating to the survey of private claims under the direction and supervision of the Secretary." (P. 495.)
>
> "The law places the Secretary at the head of the Land Department and makes it his duty to see that the laws of Congress respecting private land claims are carried out, and if knowledge comes to him in any way that the Commissioner has approved of any survey which is not authorized by law, he has authority, whether an appeal be taken or not, to review the action of the Commissioner, and to overrule it if it be erroneous. He cannot allow the government to be despoiled through what he deems to be a mistake in fact, or error in law, or any remissness on the part of any subordinate under him." (P. 497.)

This view was approved by this Court in *Lee* v. *Johnson* (116 U. S. 48, 52), in the following language:

> "So, in the present case, the Secretary of the Interior came to the conclusion, from the evidence returned by the register, that Johnson must be considered not as a *bona fide* homestead claimant, acting in good faith, but as one seeking, by a seeming compliance with the forms of law, to obtain a tract of land for his son-in-law, who had previously exhausted his homestead privileges, observing that the element of good faith is the essential foundation of all valid claims under the homestead law. Under these circumstances, so far from having exceeded his jurisdiction in directing a cancellation of the entry, he was exercising only that just supervision which the law vests in him over all proceedings instituted to acquire portions of the public lands."

When we consider the official relation existing between the Collector and the Auditor, in so far as the settlement of claims against the government, and the determination of the availability of a general appropriation for the payment of same, are concerned, the foregoing analogy becomes strikingly applicable. The Collector is a subordinate executive officer, of the Department of Finance, subordinate to and under the executive supervision of the Secretary of Finance. (Section 83, Code.)

The Auditor occupies a unique position. He neither belongs to nor is he under any sort of supervision by any of the heads of any of the executive departments, created by the Philippine Legislature. On the contrary, he is a creature of Congress, appointed by the President of the United States, and standing separate

and apart from the six executive departments of the Philippine Government (Section 75, Code), and having exclusive, final, and conclusive supervision over these executive departments or branches, in so far as accounts of and claims against the Government are concerned, subject only to the general supervision of the Governor General. (Section 24, Organic Act; Articles I and IX, Chapter 26, Code.) Even this general supervision of the Governor General over the Auditor does not extend to the setting aside or reversal of any decision of the Auditor in the settlement of an account or claim against the government, for when on appeal to the Governor General the "latter disagrees with the Auditor's decision, he must forthwith transmit the matter to the Secretary of War for final decision." (Section 25, Organic Act.)

The fact that Congress itself saw fit to create this office, to prescribe its duties, powers and responsibilities, to provide that its incumbent be the appointee of the President of the United States, and the care with which Congress provided as to the finality of this officer's decisions, not reversible even by the supreme executive of the Islands, the Governor General, but only by the head of one of our own Executive Departments, the Secretary of War, show clearly the importance which Congress attached to the office, and that Congress intended its incumbent should occupy not only a unique but a powerful position with relation to the revenues and expenditures of the Philippine Government.

The reasons for this concern of Congress are obvious. The Organic Act was an experiment. Congress was dealing with a new proposition. A people, whom many believed only in their swaddling clothes in the

art of self-government, were being given a rather complete degree of local autonomy, to test and train them in the intricacies of self-government. Congress realized that under such circumstances safeguards were necessary, and among these none were more important than the safeguard over the revenues and expenditures of the new nation. Even our own Government has had such safeguards from its beginning, and the experience of a century and a half shows the need for their continued existence.

For this new government Congress evidently further realized that merely to provide it with a system of check and balance practically identical to our own was not enough. Until sufficiently trained to properly use that system, local control thereof was not desirable. Congress placed this control in the hands of an appointee of the President of the United States, the Auditor, and further provided that this control was subject only to an appeal to the Governor General and the Secretary of War, and that only the latter should have power of reversal.

It necessarily follows that the officers of the executive branches of the Philippine Government are subordinate to this officer in so far as the settlement of accounts and claims are concerned (see footnote 3, *supra.*) Hence we find the full application of the above analogy. And this is made doubly clear by some of the express provisions of the law. Section 1383 of the Code provides in connection with the decision of the Collector on protest:

> "The party aggrieved by the decision of the Insular Collector in any matter brought before him upon protest * * * may procure the cause to be removed for review in to the Court of First

> Instance. * * * unless the proper parties in interest shall procure the cause to be thus removed into Court for review, the action or decision of the Insular Collector shall be final and conclusive *against him.*" (Italics ours.)

Section 1384 then provides that if the Collector's decision is adverse to the Government, the Secretary of Finance may order the cause to be removed to the Court of First Instance.

We think it clear that the provision as to the finality and conclusiveness of the Collector's decision applies only to an aggrieved claimant. But should the Court find that it also applies to the Secretary of Finance, the situation is not changed so far as this case is concerned, for that which binds the Secretary of Finance in no way binds the Auditor, and the provision in the Organic Act that the decisions of the Auditor shall be final and conclusive on the executive branches of the Philippine Government shows that Congress did not intend to give the Collector greater jurisdiction, authority, and responsibility than that conferred upon collectors in the United States by making such decisions independent of all check and conclusive on the Auditor. The Tariff Law of 1909 came into existence long prior to the present government of the Philippines created by the Organic Act, hence its provisions must be construed in connection with those of the Organic Act, and thus the general supervision over expenditures given the Auditor in the latter applies to the decisions of the Collector over the former as fully as to the decisions of any other executive officer. This the Philippine Legislature recognized in passing Sections 1383, 1386, Code, *supra.*

Thus to paraphrase Secretary Lamar's language, as well as that of this Court in *Lee* v. *Johnson, supra,* we well may say that the law imposes upon the Auditor the responsibility to see that the laws of Congress and the Philippine Legislature respecting private claims are carried out, and if knowledge comes to him in any way that the Collector has approved a protest which is not authorized by law, he has the authority to review the action of the Collector, and to overrule it if it be erroneous. He cannot allow the Government to be despoiled through what he deems to be a mistake of fact, or error in law, or any remissness on the part of any subordinate under him. So far from exceeding his jurisdiction in so doing, he is exercising only that just supervision which the law vests in him in connection with claims presented to acquire money out of some general appropriation in the Insular Treasury.

Point VIII

An excellent illustration of this supervisory power and responsibility of the Auditor is found in a recent decision of the highest court of England.

The check and balance systems in existence in the United States through the Auditors and Comptrollers of the Treasury and in the Philippine Islands over administrative officers dealing with public moneys are not isolated instances. An excellent illustration of the system in England is disclosed by the recent case of *Rex* v. *Roberts* (1 K. B. 514-524 (1924), 2 K. B. 695, 729 (1924), (1925), A. C. 578, 618).

In order that the distinction between that case and the present case, in so far as the jurisdiction of the

courts is concerned, may be kept clearly in mind, it should be pointed out at the outset that the English case reached the court under an express statutory provision authorizing review by the courts on certiorari of any decision of the auditor disallowing or surcharging an account or item thereof. No such jurisdiction is conferred upon the courts in the Philippine Islands, except through the limited procedure provided by Sections 1383, 1384, and 1386 of the Code, which was not followed in the present case. However, this English case having reached the courts properly, the decision on the merits is, to say the least, interesting in the clarity and force with which the auditor's supervisory power and responsibility are defined and sustained.

By s. 247, Sub-s. 7, of the Public Health Act, 1875, it was provided that the district auditor "shall disallow every item of account contrary to law, and surcharge the same on the person making or authorizing of the illegal payment, and shall charge against any person accounting the amount of any deficiency or loss incurred by the negligence or misconduct of that person, or of any sum which ought to have been but is not brought into account by that person. * * *"

By s. 62 of the Metropolis Management Act, 1853, it was provided that the Board of Works of municipal districts shall "appoint or employ or continue for the purposes of this act, and may remove at pleasure, such clerks, treasurers, and surveyors, and such other officers and servants as may be necessary, and *may allow to such clerks, treasurers, surveyors, officers and servants, respectively, such salaries and wages as the board * * * may think fit.*" (Italic ours.)

The Board fixed the wages of its employees at a cer-

tain weekly sum largely in excess of the prevailing rates obtaining in private employment in that district and at rates which had been paid for a year or two previous, when the cost of living was higher, due to war conditions. The district auditor made a careful investigation of the facts and disallowed credit for payments made to the employees in excess of the prevailing local rates in private employment and charged the amount thereof against the members of the Board who had voted for the excess rates. The Board thereupon applied to the Divisional Court for a writ of certiorari to review the action of the auditor, and on a rule nisi the court unanimously discharged the rule and upheld the auditor. An appeal was taken to the Court of Appeals, where the Divisional Court was reversed. This case was then taken to the House of Lords, where the Court of Appeals was unanimously reversed and the decision of the Divisional Court affirmed, Lords Buckmaster, Atkinson, Sumner, Wrenbury and Carson writing separate concurring opinions.

The contention was made that the phraseology of the Metropolis Management Act of 1853, *supra*, which authorized the Board to employ servants and allow them such wages as it might "think fit" conferred exclusive discretion in the Board and that the auditor was without authority to disallow and surcharge any excess payments on the ground that same constituted an unlawful payment; that the auditor's jurisdiction was limited to determining the mathematical accuracy of the payments and whether same were made to the persons employed.

The case appears to have been elaborately argued in the House of Lords by MacMillan, K. C., and Sir

John Lithiby for the Auditor. They contended, among other things, that:

> "* * * a district auditor has a larger duty than, say, the auditor of a limited company (private business firm) whose function is to see that the items appearing in the balance sheet correspond with the vouchers. It is a part of his duty to protect the borough funds against improper expenditure and to determine whether any particular item of expenditure is unreasonable in the sense of being 'contrary to law.' 'Contrary to law' includes the whole ambit of proper administration * * *. The discretion conferred upon the council is not an uncontrolled discretion but must be exercised reasonably. The standard of reason is implicit in all the powers entrusted to a public body of this kind."

Each of the separate concurring opinions is an exhaustive consideration of the respective duties of administrative officers and auditors, but they are too long to quote here. Short extracts only will be given. Lord Atkinson said, page 597, among other things that:

> "If the business of the Auditor was merely to vouch the payment of the money paid in discharge of items ex facie legal, the audit would appear no protection whatever against the squandering of public funds."

Compare therewith views of Postmaster General Kendall (ante, p. 32), and Secretary of the Treasury Woodbury (ante, p. 25).

Lord Sumner said, page 601, that:

> "I put aside as absurd the contention that 'item' means only the name of the object of expenditure and is exclusive of the amount. The effect would be, that the auditor could not examine

at all into the prices paid for the goods purchased. Extravagant expenditure on permitted objects would receive an absolute charter of immunity, and a statutory body, strictly tied up in one dimension, would be free to move to infinity in another. At this point, therefore, we find an enactment, which binds the council to submit to the auditor's examination all their expenditure and binds him to examine the whole and every part of it to test its legality, and to disallow any and every expenditure found to be contrary to law."

He further said with respect to the respective authority of the Board, page 602, and of the auditor, page 604:

"My Lords, the section imposes a duty coupled with a power. In the case of an actor, who is the creation of the law, it is from some provision of the law, express or implied, statutory or otherwise, that each and every power lawfully used must somehow be derived. In the case of a section conferring a statutory power on one person there is no necessity to read into it an intention to limit a statutory power conferred on some other person, nor is there any need to imply an exemption of the exercise of the power, which the section itself gives, from subsequent review under powers to that effect given by another and, in this case, a later Act. Language, may, of course, have been employed of a scope so wide as to lend to this result, but prima facie empowering words have had their due effect and are spent, when the power has been effectually conferred."

* * * * *

"The purpose, however, of the whole audit is to ensure wise and prudent administration and to recover for the council's funds money that should not have been taken out of them. If, having ex-

amined the expenditure and found clear proof of bad faith, which admittedly would open the account, the auditor further found that the councillors' evil minds had missed their mark, and the expenditure itself was right, then the expenditure itself would not be 'contrary to law' and could not be disallowed. Bad faith admittedly vitiates the council's purported exercise of its discretion, but the aduitor is not confined to asking, if the discretion, such as it may be, has been honestly exercised. He has to restrain expenditure within proper limits. His mission is to inquire if there is any excess over what is reasonable. I do not fiind any words limiting his functions merely to the case of bad faith, or obliging him to leave the ratepayers unprotected from the effects on their pockets of honest stupidity or unpractical idealism. The breach in the words 'as they may think fit,' which the admitted implication as to bad faith makes, is wide enough to make the necessary implication one both of honesty and of reasonableness. It might be otherwise, if the expressed words were to be read as absolute and unqualified, but if they are to be read as subject to some qualification, I think that qualification must be derived from the purpose of the statutory audit, which is the protection of the ratepayers' pockets and not the immunity of spendthrift administration. Next, in the case and for the purpose assumed, the auditor, when he reviews the accounts, is entitled and bound to use his own judgment as to the wages that would be reasonable under the circumstances. He must do so, in order to measure from that datum the excess of the wages paid, and to decide if the excess is so great as to evidence mala fides. So it will be also with the Courts of law on appeal. If in the case of bad faith the auditor is capable of finding a reasonable amount and is bound to proceed to do so, I find no words in the section which, on a sound construction, pre-

> clude him from doing the same thing when good faith is present, and I think that in both cases the reasonableness of the amounts is a subject for his review."

The language of the Organic Act that the Auditor shall "examine, audit and settle all accounts pertaining to the revenues and receipts from whatever source" and that such settlements "shall be final and conclusive upon the executive branches of the Government," when coupled with the history of the accounting system in the United States, leaves no room for doubt but that the Auditor has the jurisdiction and the duty to audit and settle claims approved by the Collector for refund of customs duties. Since there is no provision of law to review by certiorari on the merits the decisions of the Auditor as in the English case of *Rex* v. *Roberts,* and since a writ of mandamus cannot be used as a writ of error for such purpose (*Work* v. *Rives, supra*), it would appear to conclusively follow that the judgment of the court below is erroneous and should be reversed.

Point IX

To limit the term "account" as used in the Accounting Law and in Section 24 of the Organic Act to the meaning given it by the court below is contrary to the settled construction of statutes of the United States with which the use of the term is assimilated and would destroy the accounting system created by Congress for the Philippine Islands.

The court below held that because the claim of the Company in this case consisted of only one item which

grew out of one transaction, and the only question involved being the legality of the claim, it was not an account "within the definition of the word." (R. 74.) Presumably the court meant that the claim was not an account within the meaning of the Accounting Law and Section 24 of the Organic Act.

The court quoted in support of this holding from the case of *Powers* v. *United States* (18 Ct. Cls. 275), as follows:

> "An account is something which *must* be adjusted and liquidated by arithmetical process." (Italics ours.)

An examination of this case clearly shows that it sustains no such proposition as the court below attributed to it. In the first place the quotation is inaccurate in a very important respect. What the Court of Claims actually said was:

> "An account is something which *may* be adjusted and liquidated by arithmetical computation." (Italics ours.)

Further, when the nature of the question before the Court of Claims and the other language used by that court are considered, there is furnished an excellent illustration of the danger of selecting a single sentence from a decision and citing it to sustain some proposition. The matter before the court in that case was a claim for unliquidated damages. The Secretary of the Interior, to which Department the claim initially was presented, concurred in the opinion of his subordinates that the claimant was entitled to some damages, but expressed the opinion that the Depart-

ment had no authority to adjust such damages, and proposed to submit the case to Congress. The court concurred in this view, holding and *only holding* that a claim for unliquidated damages is not an account within the meaning of the accounting laws.

Again, in the citation of the court below of the definitions of "account" from Words & Phrases (R. 73-74), we find a selection only of definitions suitable to the court's view. In the same work (Words & Phrases), definitions of "account" within the terms of which the Company's claim readily falls are easily found. For example:

> "The word 'account' has various meanings and shades of meanings, and is used in various ways. Where used alone, without words of limitation, extension, qualification, or explanation, it is equivalent to the word 'claim' or 'demand' * * *. *Southern Kan. Ry. Co.* v. *Gould*, 24 Pac. 352, 44 Kan. 68." (P. 88.)

That mutuality is not necessary:

> "It is none the less an account that all the items of charge are by one person against another, instead of being a statement of mutual demand of debits and credits, provided the contract arise out of charges express or implied, or from some duty imposed by law. *Nelson* v. *Posey County*, 4 N. E. 703, 105, Ind., 287." (P. 89.)

That more than one item is not necessary:

> "An account, within Code, Sec. 158, declaring that a party may demand a bill of particulars when an account is alleged in an adverse pleading,

> may be of a single entry or of a great number, and for a short or long period. *Dowdney* v. *Volkening*, 37 N. Y. Super. Ct. (5 Jones & S.) 313, 318." (P. 90.)

The court below then quotes from page 90 (Words & Phrases):

> "The stating of a single demand, the amount and validity of which has become unalterably fixed is not an account within the meaning of Comp. St. 1897, c. 18, sec. 23, requiring the board of county commissioners to examine and settle all 'accounts.' "

Here again we have a shot in the dark; but, even so, the court below evidently overlooked or failed to give proper weight to the fact that in the above case the court held that not only the amount but the *validity* of the demand must have become "unalterably fixed." Had the question of the validity of the claim in the present case been undisputed, there would have been no suit.

The above quotation comes from the case of *Perkins County* v. *Keith County* (78 N. W. 630). Perkins County was formed from a portion of Keith County. Pursuant to statute the County Boards of the two counties meeting together proceeded to divide the property, and adjust the liabilities of the parent county. A final adjustment, agreed to by both boards, fixed an amount due and owing from Perkins County to Keith County in a definite sum. Perkins County thereafter refused to pay this sum, and in this suit contended that the claim was subject to the examination and settlement of its County Board. The court

held that the board already having acted upon and agreed to the amount, there remained nothing for them to examine, settle, adjust or allow, saying:

> "It would be a work of supererogation for the Commissioners to examine and allow a claim which, under the authority of the statute, they had already fully examined and legally allowed."

The court cited *Kemmerer* v. *State* (7 Neb. 130), where it was held that when the compensation of a public officer is definitely fixed by law, the duty of the County Board in connection with his claim based upon official service is ministerial merely, "because the board has no judgment or discretion to exercise in the matter." This was precisely the point involved in the case of *Smith* v. *Jackson* (246 U. S. 338), upon which the court below relied, and which will be distinguished hereinafter. (pp. 69, 73.)

Were it not for the fact that the court below urged it so confidently, no authority would be deemed necessary to refute the proposition that a claim against the Government containing but a single item is outside the jurisdiction of the Auditor. Its mere statement seems a sufficient refutation. But neither is authority lacking.

There can be no doubt that the Congress intended to use the term "accounts" in Section 24 of the Organic Act, *supra*, in the same sense as it is used in Section 236, Revised Statutes, as amended by the Act of July 31, 1894 (28 Stat. 205, 211), relating to the accounting officers of the United States, with respect to whose duties and powers the duties and powers of the Auditor are assimilated. So, too, must the Philippine Legislature have had in mind the same

meaning when using the term in dealing with the same subject-matter in the Accounting Law, *supra.*

An examination of the Act of July 31, 1894, *supra,* and Section 236, Revised Statutes, is sufficient to show that *claim* and *account* are used interchangeably. So, too, in the administration of these laws the settlement of an account and the settlement of a claim mean one and the same thing. (2 Ops. Atty. Gen. 518, 625. 1 First Comp. Dec. (2 Ed.) 512.) And this has been recognized by the Courts. *McKnight* v. *United States* (13 Ct. Cls. 292); *United States* v. *Harmon* (147 U. S. 268).

Mutuality is not necessary to constitute an account. There have been isolated cases that confine *account* to its derivative meaning, but common business practice, as well as the great weight of judicial authority, is to the contrary. The fact that the Government had no claim against the Company was immaterial. The claim of the company against the Government constituted an account within the jurisdiction of the Auditor.

> "An 'account' is a general term which covers any item of indebtedness, by contract, express or implied. 1 Cyc. 362; 1 Am. & Eng. Ency. Law, 434, and notes; 1 Words & Phrases, 87 Cave, Use of Wallace V. Burns, 6 Ala. 780; Morrisette, *Extr.* v. *Wood,* 128 Ala. 505, 507, 508, 30 South, 630."
>
> *Dees* v. *Self Bros.* 51 So. 735, 736.

> "While the primary idea of account—computatio—implies matters of debit and credit, the adjustment of which will show a balance to be accounted for by one party or the other, 'it is not necessarily restricted to several distinct items nor

is it the less an account that all the items of charge are by one person against another, instead of being a statement of mutual demands of debit and credit, provided the charges arise out of contract, express or implied, or some duty imposed by law.' 1 Enc. of L. and P. 362, *Nelson* v. *Posey County*, 105 Ind. 287, 4 N. E. 703."

McMullen Co. v. *Strother* (136 Fed. 295, 302).

Any conclusion that a single item does not constitute an account is contrary to the settled construction of the law with respect to the auditing of public accounts. Comparatively few of the millions of claims audited and settled by the accounting officers of the United States since 1789 consist of more than one item on a public voucher.

Furthermore, as pointed out by President Taft's Commission on Economy and Efficiency (House Document 854, 62d Congress, 2d Session, pp. 64, 94) the primary function of the accounting officers of the United States is the determination of availability of appropriations and only incidentally are they concerned with the abstract legal merits of a claim or account. Unless the appropriation is available for a proposed payment, the relief must be sought ultimately in the Congress for an available appropriation. This question of availability of the appropriation must be determined whether the claim consists of one item or of one hundred items.

Point X

To limit the term "audit" as used in the Accounting Law and Section 24 of the Organic Act to the re-

stricted meaning given it by the court below denies the Auditor the essential powers conferred upon him by Congress.

The court below laid great stress on the fact that the Organic Act provides that the Auditor shall:

> (a) "* * * examine, audit and settle all accounts pertaining to the revenue * * * of the Philippine Government * * *;" and
> (b) "* * * audit in accordance with law and administrative regulations, all expenditures of funds * * * pertaining to * * * the Government." (R. 73.)

The court say with reference to these provisions:

> "By the language of the act, the defendant is authorized to 'audit, examine and settle accounts.' As to the 'expenditures of funds pertaining to the Government,' he is authorized to 'audit in accordance with law and administrative regulations.'
> "It will be noted that the words 'examine' and 'settle,' which are included in, and made a part of, paragraph (a) are omitted in paragraph (b). This is significant." (R. 73.)

The court then argue (R. 73-75) that the Company's claim not being an account, did not fall under (a) above, and, therefore, the Auditor had no authority to "examine" or "settle" the same, but that his duty in connection therewith was confined to an "audit in accordance with law and administrative regulations," and that his powers thereunder were limited to the following:

"1. Ascertain that the protested claim has in fact been made;

"2. That the protest was made within due time;

"3. That no appeal has been taken from the decision and that it is, therefore, final;

"4. That the amount for which the warrant is drawn corresponds to the amount paid under protest;

"5. That there is money available in the Treasury with which to meet the payment;

"6. That the claim is one for refund of duties on repairs made abroad." (R. 75.)

We think from what has heretofore been said that such conclusion finds no support in the law. The view of the court that the authority is limited to determining whether "there is money available in the Treasury with which to meet the payment" would impose on the Auditor nothing more than jurisdiction to make a physical determination that there is money in the Treasury out of which claims for refunds of customs duties can be paid, a purely ministerial determination of a physical fact. In this the court erred, for the question for the determination of the Auditor is not whether there is money available in the Treasury, but whether there is an appropriation available. The determination of the availability of an appropriation for the payment of this claim is far from a ministerial act, for it involves a determination as to whether the claim was within the object and purpose for which the appropriation was made, viz., whether the customs duties actually had been *erroneously* and *illegally* collected.

This, however, is not the full extent of the errors of the court below, for their decision is to the effect that so far as expenditures—that is, the payment of

claims against the Government—are concerned, since the Auditor is not expressly authorized in the Organic Act to "examine" and "settle" such claims, but only to "audit" the same, his authority with reference thereto is merely that of an accountant. If this is true Congress has failed lamentably in providing for the Philippine Government a system of check and balance found so necessary in our own Government, and it may be here added, in the language of Lord Atkinson in *Rex* v. *Roberts, supra,* that such a construction of the audit would make it "no protection whatsoever against the squandering of public funds" and finds no support in the statutes, history, or decisions, with respect to the functions and duties of the auditors and comptrollers of the United States Treasury.

A description of the procedure prescribed by law and regulations and followed in the assessment and collection of the customs duties in this case will prove helpful in showing full application of the check-and-balance system, and in pointing out the true relation existing between the Collector, a collecting and accountable officer, and the Auditor, the accounting officer.

Upon the return of the steamship *Venus* to the Philippines after its repair in Hongkong, the Company as agent and operator thereof filed with the Collector a declaration supported by the consular invoice showing the value of the materials and labor that were employed in the repairs. The Collector in his capacity as Collector of Port at the City of Manila then assessed the customs duties, based upon the data indicated in the said declaration and consular invoice. After making the assessment, the declaration and the consular invoice (which form the voucher) were submitted to the

Auditor for examination, audit, and approval. The declaration and invoice having been returned approved by the Auditor, the Collector proceeded to collect the amount assessed as approved. The collection of the assessment having been effected, the Collector returned the duplicate of the papers (which constitute the voucher) to the Auditor for his record and information that payment had been made.

These transactions constitute in part the rendition of accounts which the Collector as an accountable officer is in duty bound to make to the Auditor. When he presented the declaration and the consular invoice to the Auditor for examination, audit, and approval of the assessment of duty, the Collector thereby recognized, as he is required by law to do, the authority of the Auditor to check his collection accounts in order to see whether the customs duties due on the repairs of the steamship *Venus*, as itemized in the declaration, was fully, correctly, and legally assessed. A true and conscientious examination and audit of such account carries with it the duty and responsibility, not only to ascertain that the assessment is mathematically correct, but also to see that no dutiable item in the declaration is omitted.

We respectfully submit that it would be ridiculous to permit the application of the system to stop here. After painstaking care the Auditor would see to it that the proper amount of customs duties was paid, and covered into its unappropriated fund in the Insular Treasury but that done, must then stand by and see that which had been collected refunded, powerless to prevent that which he believes to be wrong; indeed, compelled, if the decision of the court below is to stand, to lend his aid to such wrong by countersigning the warrant upon which the refund is

paid. It is submitted that Congress never intended the powers of the Auditor thus should be limited; that Congress never intended to create an office the incumbent of which must see that the officers of the executive branches collect all moneys due the Government, but should have no supervision or control, except as to matters of arithmetic, over the expenditures of Government funds by the same officers. The need for supervision is always much greater on the spending end than on the collecting end.

It is here that the court below failed to comprehend the full powers of the Auditor, and to take into consideration other portions of the law which make this point clear. Section 25 of the Organic Act provides in pertiment part:

> "That any person aggrieved by the action or decision of the Auditor in the *settlement* of his account or *claim* may * * * appeal * * * to the Governor General." (Italics ours.)

Section 584 of the Code contains the following:

> "The authority and powers of the Bureau of Audits extend to and comprehend all matters relating to accounting procedure, including * * * the examination and audit of all debts and claims of any sort due from or owing to the Government of the Philippine Islands in any of its branches."

Section 587 provides, *inter alia:*

> "The Auditor may communicate directly with any * * * person * * * having a claim before him for settlement."

Section 621 is as follows:

"No Insular warrant shall be paid by the Treasurer, until countersigned by the Auditor or by an officer of the Bureau of Audits thereunto authorized in writing by him."

The foregoing seems sufficient to demonstrate, without more, the interchangeable use of *account* and *claim*, as well as the comprehensive meaning intended for the term "audit," and that the Auditor's supervision over claims against the Government includes the power of settlement, which in turn includes allowance, modification, rejection, or disallowance. Such has always been the practice in the United States as shown by the following:

"* * * When an account or claim comes before the accounting officers for settlement or allowance, by whomsoever it may have been recommended, they have not only the power, but that it is their imperative duty, from which they can not escape without a violation of their official oaths, *to inquire into its legality, and if they deem its allowance illegal to reject it.* * * * In the system of accountability prescribed by our laws, the authority to judge of the legality of expenditures made by or under the direction of the heads of Departments, was conferred on the Auditors and Comptrollers with the design and intention that it should be exercised, and should operate as a *check upon unnecessary and improvident expenditures.*" (Italics ours.) (First Comp. Dec. Lawrence, 1880, Vol. 1, 2d Ed., p. 512.)

"It may be conceded that the Commission's [Interstate Commerce Commission] control of its appropriations is as full and complete as is that of the head of any of the Departments of the Government over the funds placed at his disposal. *But such control does not extend to the auditing*

of the accounts for the expenditure of such appropriations. Items of expense bearing the approval of the heads of Departments are disallowed every day by the accounting officers. The latter are required to examine accounts to see if the expenditures are allowed by law." (Italics ours.) (Comp. Dec. Vol. IV, pp. 269-270.)

This Court recognized the above authority of the accounting officers, as well as the interchangeable use of *account* and *claims*, in *United States v. Lynch* (137 U. S. 280, 284). And it was so held by the Court of Claims in *Longwill* v. *United States* (17 Ct. Cls. 291):

> "The Accounting officers of the Treasury are in duty bound to scrutinize claims and accounts with great care, as is their custom, and it is the undoubted right of those who have authority to decide thereon to reject in whole or in part, as their judgment dictates, all those claims which they have reasonable cause to suspect are tainted with fraud or to which they believe there may be substantial defects in law or as to the validity of which they are in doubt."

Point XI

The case of Smith v. Jackson (246 U. S. 338) distinguished.

The court below placed great weight on *Smith* v. *Jackson* (246 U. S. 338), wherein was sustained the action of the United States Court for the Canal Zone in issuing a writ of mandamus to the Auditor of the Panama Canal Zone. There the Congress had appropriated in the Act of March 3, 1915 (38 Stat. 883), for "salaries of district judge $6,000," etc. It was

held in that case that the payment of the salary as appropriated by Congress in a fixed and definite sum to a definite person was a ministerial duty. That is not the situation here, for there was no fixed and definite sum appropriated by the Legislature of the Philippine Islands as a refund to the Company of customs duties. The question whether appropriations made in general terms to make refund of customs duties erroneously or illegally collected and not considered by the Court of First Instance were available to make refunds to the Company depended on the law and facts of the Company's claim and was exclusively committed to the sound discretion of the Auditor. The court below failed to distinguish between such cases as *Smith* v. *Jackson*, *United States* v. *McVeagh*, and *Houston* v. *Ormes*, *supra*, where Congress had appropriated a specific sum to be paid to a specific person or officer and the payment of which involved the performance of a ministerial duty, and such cases as *Brashear* v. *Mason*, *Decatur* v. *Paulding*, *United States* v. *Guthrie*, and *United States* v. *Lynch*, *supra*, where Congress had appropriated a general sum for a particular class of expenditures and the availability of which appropriation to pay any particular claim was held to be a matter of judgment and discretion.

A full statement of the facts in the *Smith* v. *Jackson* case is contained in 241 Fed. 747. The attention of the Court is particularly invited to the sections of the Code for the Canal Zone (quoted on page 752 of said volume), as to the authority of the court for the Canal Zone to issue writs of mandamus. This authority was exceedingly more comprehensive than that conferred upon United States courts generally. See

Barber v. *Hetfield* (4 Fed. (2d) 245), and *Emerson* v. *Baker* (3 *id.* 830), where this was pointed out. Also the Auditor for the Panama Canal Zone was not an accounting officer of the Treasury within the meaning of the Ordinance of 1778, Act September 2, 1789, March 3, 1817, July 31, 1894, *supra*, with whose duties those of the Auditor for the Philippine Islands are assimilated by Section 24 of the Organic Act. In fact, the duties of the Auditor for the Panama Canal Zone are analogous to those of the Collector in this case. *The Canal Zone Auditor is an administrative examiner of accounts such as is common to all of the departments and establishments of the Government, and the claims and accounts examined by him were required by the act of October 22, 1913 (36 Stat. 209), to be thereafter settled and adjusted by the Auditor for the War Department, one of the former auditors of the Treasury. Not so as to the settlements of the Auditor for the Philippine Islands. They are final unless reversed on administrative appeal as provided in Section 25 of the Organic Act.*

There has been no case in the Supreme Court of the United States since the foundation of the Government (and the offices of auditors and comptrollers of the United States have been in existence throughout that period) where said Court has sustained the issuance of mandamus or injunction against them. The fact that until 1855 there existed no remedy whatever at law against the United States was not sufficient to permit such action and, as heretofore shown, the situation in the present case with respect to suits against the Philippine Government is the same as that prior to 1855 with respect to suits against the United States.

The reason for the rule is clear. The Constitution

of the United States confers exclusive control over public money to the Congress, and as pointed out by Ex-President and now Chief Justice, Taft, in his book on *Our Chief Magistrate and His Powers,* the Congress has committed exclusive authority and jurisdiction (unless otherwise specifically provided by law) to the comptrollers to determine the availability of general appropriations to pay claims. The reasons for limitations on the expenditure of appropriations are considered in the quotation in the margin.[5] The Congress has also established courts of inferior jurisdiction and conferred upon them authority to hear and

[5] "It is somewhat difficult in all cases to discover the reasons for the existence of particular limitations of discretion. In some instances a study of the history of the service for which the appropriations are granted will reveal the fact that a limitation was imposed in order to prevent an abuse of discretion which had been discovered as the result of an investigation of the service by a committee of Congress. Such, for example, is the origin of the limitation in the appropriation for the Coast and Geodetic Survey, preventing the use of the appropriation for general expenses for the pay of subsistence of officers of the service permanently stationed at Washington.

"Sometimes, however, it is undoubtedly true that the peculiarities of particular appropriations are due to the peculiar characteristics of the services for which the appropriations are made. It is in this way that the differences between the Army and Navy appropriations may be explained. * * *

"Sometimes also we find that the abuse which a peculiar limitation has been intended to remedy has been of a power granted in the appropriation which is peculiar to the service to which it is granted. Thus the limitation referred to, which is found in the Coast and Geodetic Survey appropriation, was made in order to prevent the abuse of the rather peculiar provision in that appropriation authorizing commutation of subsistence to officers of the field force. The question naturally arises whether the conditions of the Coast and Geodetic Survey are so peculiar as to justify the grant of this power when it is not granted to a service so similar in character as the Geological Survey.

"A study of the peculiarities of particular appropriations can hardly fail to force the conclusion that some of the peculiarities in appropriations can not be explained by peculiarities in the services to which they are granted, and that they are due either to the representations which have been made to the committees of Congress by heads of the services concerned or to the attitude which the committees have taken in view of the political and other conditions present at the time the appropriation was granted. * * *" (House Document No. 854, 62d Congress, 2d Session, pp. 110, 111.)

determine certain claims against the United States and has provided expressly how the judgments may be paid. There is no overlapping of the jurisdiction of such courts and the comptrollers and both are subordinate to the Congress with respect to public money. The same situation exists with respect to the Auditor for the Philippine Islands and the Supreme Court of said Islands, with the difference that (except where an appeal from the Collector to the Court of First Instance as provided by law has been perfected) said courts have had no jurisdiction conferred on them to hear and determine any claims against the Philippine Government or to determine the availability of general appropriations to pay such claims. Such jurisdiction is exclusively that of the Auditor, subject to appeal, as provided in Section 25 of the Organic Act, to the Governor General and to the Secretary of War, or to the Legislature of the Philippine Islands in accordance with the principles stated in *Reeside* v. *Walker, Brashear* v. *Mason, and Decatur* v. *Pauling, supra.*

Point XII

To grant a writ of mandamus where the law provides a plain, speedy and adequate remedy is contrary to the decisions of this Court.

The court below relied upon the decision in *Compania Generale de Tabacos* v. *French et al.* (39 Phil. 34), in denying that the Company had a plain, speedy and adequate remedy at law in this case in the appeal to the Governor General and Secretary of War provided by Section 25 of the Organic Act. (R. 81.) The sole question in that case was whether the Auditor had

authority to settle and adjust a claim for unliquidated damages. The court held that he had no such power, and to that extent its decision is in accord with *Powers* v. *United States, supra.* However, the immense amount of dicta in which the court indulged, including that cited by the court below, was neither necessary nor was it in accord with the decisions of this Court referred to throughout this brief. The dicta appear to have been merely paving the way for the erroneous assumption of a jurisdiction by that court not conferred upon it by any law, which the court ultimately consummated in the present case, contrary to the unanimous holdings of this Court and of other courts of this country throughout more than a century.

We submit that the Auditor was performing in this case semi-judicial duties involving judgment and discretion and that his acts are not subject to review on a petition for writ of mandamus, and that in any event the law afforded a plain, adequate, and speedy remedy preventing the granting of mandamus.

Section 25 of the Organic Act provides that:

> "Any person aggrieved by the action or decision of the auditor in the settlement of his account or claim may, within one year, take an appeal in writing to the Governor General, which appeal shall specifically set forth the particular action of the auditor to which exception is taken, with the reason and authority relied on for reversing such decision.
>
> "If the Governor General shall confirm the action of the auditor, he shall so indorse the appeal and transmit it to the auditor, and the action shall thereupon be final and conclusive. Should the Governor General fail to sustain the action of the auditor he shall forthwith transmit his ground of

> disapproval to the Secretary of War, together with the appeal and the papers necessary to a proper understanding of the matter. The decision of the Secretary of War in such case shall be final and conclusive."

This remedy is plain, speedy, and adequate, and where such a remedy exists there can be no resort to extraordinary judicial proceedings, *Bayard* v. *United States, ex rel White* (127 U. S. 246); *Poindexter* v. *Greenhow* (114 U. S. 270); *Bailey* v. *George* (259 U. S. 16); and particularly is this true where the law provides administrative appeals and such have not been taken, as here. *Ekiu* v. *United States* (142 U. S. 651); *United States* v. *Sing Tuck* (194 U. S. 161); *Baltimore & Ohio Railroad* v. *Pitcairn Coal Co.* (215 U. S. 481). If we substitute the Governor General and the Secretary of War, as provided in Section 25 of the Organic Act, for the Interstate Commerce Commission, the following language of Chief Justice White in the *Pitcairn case* is controlling:

> "We see no escape from the conclusion that the grievances complained of were primarily within the administrative competency of the Interstate Commerce Commission and not subject to be judicially enforced, at least until that body clothed by the statute with authority on the subject, had been afforded by a complaint made to it the opportunity to exert its administrative functions."

No appeal was taken to the Governor General in this case. In fact, the proceedings below were instituted before the Auditor had finally acted on the request of the Collector that he countersign the warrant for refund of the customs duties. (R. 16, paragraph 20 of Answer.)

Point XIII

The Government for the Philippine Islands is the real party in interest and a necessary and indispensable party.

The Auditor has no personal interest in the money in the Insular Treasury. Such money is the property of the Government for the Philippine Islands. A proceeding against the Auditor because of his official position and concerning the public money in the Insular Treasury is a proceeding against the Government for the Philippine Islands. The rule is settled that under such circumstances jurisdiction must be determined by the real and not the nominal parties in interest, and that where the Government is the real party in interest and cannot be made a party, the proceedings must fail. *Wells* v. *Roper* (246 U. S. 335); *Louisiana* v. *McAdoo* (234 U. S. 627); *Oregon* v. *Hitchcock* (202 U. S. 60); *United States, ex rel Goldberg,* v. *Daniels* (231 U. S. 218).

This suit does not rest upon an abuse of power by the Auditor, and the case of *Goltra* v. *Weeks,* decided June 7, 1926, by the Supreme Court of the United States is not apropos. The suit is an interference with the official discretion of the Auditor, and we submit that the Government for the Philippine Islands as the real party in interest is an indispensable and necessary party.

Point XIV

The Governor General and the Secretary of War are the superior officers of the Auditor and are indispensable and necessary parties.

By Section 24 of the Organic Act the office of the Auditor is "under the general supervision of the Gov-

ernor General," and under Section 25 of said act the decisions of the Auditor are reviewable by both the Governor General and the Secretary of War. It would seem to be clear that while the Auditor is appointed by the President, he is the subordinate of both the Governor General and the Secretary of War in the settlement of accounts. If this be true, it necessarily follows that under the decision of this Court in *Webster* v. *Fall et al.* (266 U. S. 507), the judgment of the court below must be reversed because the Governor General and the Secretary of War were not made parties to these proceedings and are necessary and indispensable parties.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court for the Philippine Islands is erroneous and should be reversed with directions to dismiss the petition.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1926

No. 316

Ray P. Wardon, *Auditor for the Philippine Islands*, Petitioner,

v.

Emerson Abe Dibert, Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

REPLY BRIEF FOR PETITIONER.

J. R. Hamilton,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 316

BEN F. WRIGHT, *Auditor for the Philippine Islands, Petitioner,*

v.

YNCHAUSTI AND COMPANY, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS

REPLY BRIEF FOR PETITIONER

PRELIMINARY STATEMENT

Our main brief on behalf of the Auditor went into considerable detail relative to the history, functions,

and decisions applicable to the accounting officers of the Treasury. This was done so as to conserve the time of the Court in the matter of research as to such history, functions, and decisions, particularly as this is the second time in the 137 years' history of the United States, that an accounting officer of the United States has been before this Court in his official capacity—the first time having been in *United States v. Lynch*, (137 U. S. 280). As shown in our main brief (p. 71), the case of *Smith v. Jackson* (246 U. S. 338) did not concern an accounting officer of the United States but an administrative examiner of accounts and claims. Smith's accounts were required by the Act of October 22, 1913 (36 Stat. 209), to be settled and adjusted by the Auditor for the War Department, subject to appeal, as provided in the Act of July 31, 1894 (28 Stat. 208), to the Comptroller of the Treasury. The functions of the Canal Zone Auditor were analogous to those of the Collector in this case.

We believe that it will be of assistance to the Court to analyze the argument of counsel for the Company, and, in order to do so, we shall show: (1) The inapplicability of the principal decisions cited on behalf of the Company to the question here at issue; and (2) The fallacy, as we believe, of their argument that the Auditor performs only ministerial duties with respect to claims for refund of customs allowed by the Collector, or, to state it differently, that the Collector is the sole executive official of the Philippine Islands whose accounts are not subject to audit and settlement by the Auditor and on whom the Auditor's decisions are not final and conclusive.

I.

THE INAPPLICABILITY OF THE PRINCIPAL DECISIONS CITED ON BEHALF OF THE COMPANY TO THE QUESTION HERE AT ISSUE.

The first case cited by counsel for the company is *United States v. Jones* (18 Howard 92) (p. 12). It will be conceded that if a statute, in specific, terms reposes all discretion in the administrative executive officer, the accounting officers are not charged with the "burden of responsibility cast upon" such administrative officers "of revising the judgments, correcting the supposed mistakes, or annuling the orders of the heads of departments." We deny, however, that the statutes in this case repose all discretion in the Collector.

The *Jones case* arose in 1856, out of a payment on order of the Secretary of the Navy, of a sum of money to a Navy officer who was injured while on leave, that is, while not on duty, in Paris, and for the purpose of paying the officer's hospital expenses. The accounting officers of the United States ruled that the payment was improper, being prohibited by the Act of March 3, 1835. Suit was brought against Jones in the former District Court of Washington, which upheld the payment and upon appeal to this Court, the judgment was sustained, two justices dissenting.[1] There appears to have been no express provision of law

[1] Hotchkiss, *Judicial Work of the Comptroller of the Treasury* (p. 19), says:

"This principle was never fully accepted by the officers of the Treasury. In 1856, Secretary Guthrie had instructed the fourth auditor that it should be held to apply only to the particular case and not considered as changing the law (cf. Renick E. I., in Pol. Sci. Quarterly vi. p. 277). The Act of 1868 (15 Stat. 54), was a statutory confirmation of a principle already established in actual practice."

making the order of the Secretary of the Navy conclusive on the accounting officers of the Treasury, and it is instructive to compare with the language quoted by counsel from the majority opinion of the Court, the views of Secretary Alexander Hamilton, Secretary Woodbury, The House Committee on Revision of the Laws, President Taft, the President's Commission on Economy and Efficiency, and of Postmaster General Kendall, as well as the views of the House of Lords in *Rex v. Roberts,* 1925 A. C. 578 (quoted at pages 23, 25, 26, 27, 28, and 32, 53-56, respectively, of our main brief). The discretion conferred on the Board in *Rex v. Roberts,* was much greater, in the payment of salaries to its employees, than was the discretion conferred on the Secretary of the Navy in the payment of the hospital expenses of Navy officers incurred while on leave.

However that may be, the Congress, by act of July 15, 1870 (16 Stat. 334), which was carried into the Revised Statutes as Section 1586, expressly adopted the views of the accounting officers of the Treasury in the *Jones case,* by the provision that:

> "Expenses incurred by any officer of the Navy for medicines and medical attendance shall not be allowed unless they were incurred when he was on duty, and the medicines could not have been obtained from naval supplies, or the attendance of a naval medical officer could not have been had."

Thus it was that another limitation on adminstrative discretion in the expenditure of appropriated moneys was placed in the law (see footnote, page 72 of our main brief). The Congress delegated to the accounting officers the appropriation

control which had been denied in the *Jones case.* (See footnote, p. 28 of our main brief.) *This is not a question of the relative merits of control by administrative officers or by accounting officers over appropriations. It is a question of legislative control over the expenditure of public funds and the placing of the immediate responsibility therefor in the accounting officers of the United States, and the Auditor for the Philippine Islands,* who are wholly unconnected with the spending agencies and who may be presumed to have no personal interest in the settlement of the claims and accounts. Furthermore, it is a centralized control, its theory being well expressed by Shakespeare, in King Lear (Act II, Sec. 4, l. 243) as follows:

> "How, in one house, should many people under two commands hold amity? 'Tis hard; almost impossible."

President Coolidge said in his annual message to Congress (67 Congressional Record, 121), that:

> *"But it is evidently not enough to have care in making appropriations without any restraint upon expenditures. The Congress has provided that check by establishing the office of Comptroller General.*
>
> The purpose of maintaining the Budget Director and the Comptroller General is to secure economy and efficiency in Government expenditure. No better method has been devised for the accomplishment of that end. These offices can not be administered in all the various details without making some errors both of fact and of judgment. But the important consideration remains that *these are the instrumentalities of the Congress and* that *no other plan has ever been adopted which was so*

successful in promoting economy and efficiency. The Congress has absolute authority over the appropriations and is free to exercise its judgment, as the evidence may warrant, in increasing or decreasing budget recommendations. But *it ought to resist every effort to weaken or break down this most beneficial system of supervising appropriations and expenditures. Without it all the claim of economy would be a mere pretense.*" (Italics ours.)

That this system of accountability for public money has worked well is attested by the fact that in 137 years' history of our Government there have been no charges of scandal or fraud in the expenditure of public money for which Congress had made detailed provision and required an accounting therefor to the accounting officers of the United States. Charges of fraud and corruption, to which this Court has recently listened in the *Pan Petroleum Oil case,* have been more or less frequent in the administrative handling of the land, mineral, and other physical resources of the United States, and it is to be noted that there is no immediate check or control over administrative officers in the disposition of the physical property in their charge. Surely we are justified in concluding that the system of accountability for public money, which has been in existence since the foundation of the United States for all the branches of the Executive Departments of the Government except the Post Office Department to 1836, and which was applied to said Department at the urgent request of Postmaster General Kendall, and which was deliberately adopted for the Philippine Islands in the Organic Act, has had something to do with the matter. In the language of President Coolidge, *it is the best plan that has been*

devised to secure economy and efficiency in the expenditure of public money. In any event, both the statutes and the history of our Government are committed to appropriation control by Congress through the accounting officers over the spending agencies of both the United States and the Philippine Governments.

It may be said that this is also true with respect to the Porto Rican and Hawaiian Governments.

The second case cited by counsel for the company (p. 12), is that of *United States v. Johnston* (124 U. S. 236), which arose out of the settlement of the accounts of a special agent of the Treasury who had been engaged to collect confiscated cotton of the late Confederate States. The settlement there in question was one against the special agent—not against the United States—to recover expenses which had been approved by the Secretary of the Treasury. *Mr. Justice Harlan was careful to point out that the payments made to the special agent on order of the Secretary of the Treasury were made from the proceeds of the cotton and not from general appropriations in the United States Treasury.* In other words, *the question there was not the availability of a general appropriation, as here, to pay a specific claim but was a question whether the special agent was indebted to the United States.* Compare *Soule v. United States* (100 U. S. 8). Also, compare *Rex v. Roberts.* Obviously, the *Johnston case* is not a precedent in this case but it is instructive to note that Congress has since provided in the act of June 8, 1896 (29 Stat. 268):

> "That from the proceeds of sales of old material, condemned stores, supplies, or other public property of any kind, before being deposited in the Treasury, either as miscellaneous receipts on

> account of 'proceeds of Government property' or to the credit of the appropriations to which such proceeds are by law authorized to be made, there may be paid the expenses of such sales, *as approved by the accounting officers of the Treasury* * * *." (Italics ours.)

It would thus appear that the same considerations which led to the enactment of the act of July 15, 1870, negativing the effect of the *Jones case*, also led to the enactment of the act of June 8, 1896, reserving to the Congress, through the accounting officers, the power theretofore existing in the administrative departments to approve expenses of sales of Government material; that is, in the language of Secretary Woodbury, to take away from those "empowered by law to decide on the necessity of certain services and purchases" the power to "adjust the accounts rendered for" such services and purchases. (p 25, main brief).

We concede that where either Congress or the Philippine Legislature has appropriated a specific sum to pay a particular salary or claim, as in the *MacVeagh*, and *Ormes cases*, mandamus may properly issue in aid of legislative control over public money in event the Comptroller or Auditor fails or refuses to countersign a warrant for payment of same, but *we contend that mandamus cannot properly issue where either Congress or the Philippine Legislature has appropriated a general or lump sum to pay a general class of claims and has reposed in the Comptroller or Auditor the responsibility of determining whether any particular claim is payable from said general appropriation.* Mandamus issued under such circumstances would defeat legislative control over public money, a control older than our present

form of Government (pp. 22-24, and 30, main brief).

Moreover, the determination of the availability of a general appropriation to pay a claim is from the very nature of the case a discretionary, and not a ministerial duty even when exercised by the spending agencies, as was properly recognized in the *Brashear, Decatur,* and *Guthrie cases* (pp. 16, 31, main brief), before same reached the accounting officers for final determination except for appeal to Congress. It would seem to be clear that the cases of *Commissioner v. Whitely* (4 Wall. 522), and *Lane v. Hogland* (244 U. S. 174), cited by counsel for the Company (p. 21), are not appropos.

We think that the case of *Smith v. Jackson* (246 U. S. 388) cited by counsel for the Company (p. 21), is sufficiently distinguished in our main brief (pp. 69-73). Compare *United States v. Lynch, supra,* and *Carroll Electric Company v. McCarl* (8 Fed. 2d 910), and *Margulies Company v. McCarl* (10 Fed. 2d 1012). Certiorari was denied October 11, 1926, to review the *Margulies case.* We would request this Court, if it can consistently do so, to explain and show the application of the *Smith v. Jackson case.* The present uncertainty of the lower courts with respect thereto is not conducive to good administration.[2] The

[2] District courts in *Dillon v. Groos* (299 Fed. 851), *Howe v. Elliott* (300 Fed. 243), *Mare v. Alexander* (2 Fed. 2d, 895), and the First Circuit Court of appeals in *Wylly v. McCarl* (5 Fed. 2d, 964) applying it to authorize issuance of a writ of mandamus in an original proceeding and the Ninth Circuit Court of Appeals holding that it did not do so in *Barber v. Hetfield* (4 Fed. 2d, 245). Also, a District Court holding in *Emerson v. Baker* (3 Fed. 2d, 830), that it did not authorize a mandatory and prohibitory injunction in the matter of the pay and allowances of an Army officer payable as in *Brashear v. Mason* (6 Howard, 92), from general appropriation and the Supreme Court of the District of Columbia in *Pence v. McCarl* (54 Wash. Law Rep. 178) and the Court of Appeals of said District in *McCarl v. Cox* (8 Fed. 2d, 669), holding that it did so authorize. It is to be noted that section 24 of the act of March 3, 1911 (36 Stat. 1093) reserves to the Court of Claims all jurisdiction of suits of Army and Navy officers for pay and allowances.

Cox, Mare, and *Pence cases,* cited by counsel for plaintiff (p. 21), concern the pay of Army and Navy Officers. The lower courts purported to follow in said cases, as did the court below in this case, the *Smith v. Jackson case.* This is not a salary question. Even if it were, we submit that said decisions of the lower courts cannot be reconciled with either the decisions of this court in the *Brashear, Decatur,* and *Guthrie cases,* or, if we are correct in our explanation of the *Smith v. Jackson case,* with said case.

II.

THE CLAIMS APPROVED BY THE COLLECTOR, EITHER FOR COLLECTION OF CUSTOMS OR FOR REFUND THEREOF, DO NOT CONSTITUTE EXCEPTIONS TO THE GENERAL RULE THAT THE AUDITOR, SUBJECT TO ADMINISTRATIVE APPEALS OR APPEAL TO CONGRESS OR TO THE PHILIPPINE LEGISLATURE HAS EXCLUSIVE AND CONCLUSIVE JURISDICTION TO SETTLE ALL CLAIMS FOR OR AGAINST THE PHILIPPINE GOVERNMENT CHARGEABLE TO GENERAL APPROPRIATIONS.

For the purpose of ready comparison of their terms, we quote, in juxtaposition, the pertinent provisions of the statutes, under which exclusive jurisdiction is claimed for the Collector and of the statutes under which we contend that the Collector's decisions for refund of customs duties are made subject to the judgment and discretion of the Auditor.

The Philippine Tariff Act of August 5, 1909 (36 Stat. 130), provided that duties should be collected on:

"200 * * * costs of repairs made in foreign countries to vessels, or to parts thereof, documented for the Philippine Coastwise trade or plying exclusively in Philippine waters and for which repairs adequate facilities are afforded in the Philippine Islands. * * * Provided, That upon proof satisfactory to the Collector of Customs that adequate facilities are not afforded in the Philippine Islands for such repairs the same shall be subject to the provisions of paragraph three hundred and forty-eight of this Act."

The following articles shall be free of duty:

"348. Repairs to vessels documented in the Philippine Islands or regularly plying in Philippine waters, made in foreign countries, upon proof satisfactory to the Collector of Customs that adequate facilities for such repairs

The Organic Act of August 29, 1916 (39 Stat. 545), provided:

"Sec. 24. * * * The decisions of the Auditor [who shall examine, audit, and settle all accounts pertaining to the revenues and receipts from whatever source of the Philippine Government * * * and audit, in accordance with laws and administrative regulations all expenditures of funds or property pertaining to or held in trust by the government or the Provinces or municipalities thereof. He shall perform a like duty with respect to all government branches] shall be final and conclusive upon the executive branches of the Government, except that an appeal therefrom may be taken by the party aggrieved or the head of the department concerned within one year in the manner hereinafter prescribed. The Auditor shall, except as hereinafter provided, have like authority as that conferred by law upon the several auditors of the United States and the Comptroller of the United

are not afforded in the Philippine Islands."

This act was amended in 1919, by the Philippine Legislature, to provide:

"That upon proof satisfactory to the Collector of Customs that adequate facilities are not afforded in the Philippine Islands for such repairs, so that the work can not be done there reasonably economically and within a reasonable time, in the judgment of said Collector, such repairs shall be subject to the provisions of paragraph three hundred and forty-eight of this Act."

States Treasury * * *."

Section 584 of the Code provided:

"The authority and powers of the Bureau of Audits [the office of the Auditor] extend to and comprehend all matters relating to accounting procedure, including * * * the examination and audit of all debts and claims of any sort due from or owing to the Government of the Philippine Islands in any of its branches."

Section 587 of the Code provided:

"No insular warrant shall be paid by the Treasurer, until countersigned by the Auditor or by an officer of the Bureau of Audits thereunto authorized in writing by him."

The learned counsel for the Company have not attempted to advance any reasons why claims approved by the Collector for refund of customs duties should be conclusive on the Auditor when the Auditor's decisions are made by the specific terms of a statute, subsequent in date to that under which the Collector functions, final and conclusive on all executive officers and branches of the Philippine Government, subject to appeal to the Governor General and the Secretary of War or to the

Congress and, in some instances, to the Philippine Legislature. We submit that reasons therefor cannot be advanced, particularly, when, as shown by the committee reports, which are quoted as an appendix to the brief for the Company, it was the avowed intention of the framers of Section 24 of the Organic Act to require all accounts to pass through "the hands of the Auditor" for the purpose of insuring "a protection against the possibility of graft or the misappropriation of funds in the Islands."

It would indeed be strange to find that the accounts of a Philippine Collector of Customs had been exempted from audit and settlement by the Auditor when for more than an hundred years the accounts of Collectors of Customs in the United States have been subjected to two audits and settlements—one by Naval officers, now Comptrollers of Customs, and the other by the accounting officers of the Treasury, now the General Accounting Office (pp. 43-44, main brief.) The Organic Act contains no intendment that in granting the Philippine Islands a more autonomous form of Government, it was found desirable to depart from safeguards in the accounting for appropriated moneys which experiences of a century had demonstrated were necessary in the United States, and, as appears from *Rex v. Roberts*, were likewise necessary in England.

The following pertinent extract is quoted from Report No. 1369, 69th Congress, 1st Session, from the Committee on Insular Affairs:

> "The accounting system for the governement of the Philippine Islands is substantially the system that has been in operation in the United States since the said ordinance of September 26, 1778. The Constitution provides in Article I, section 9, that no money shall be drawn from the Treasury

save in consequence of an appropriation by law, and the organic act contains a similar provision with respect to the treasury of the Philippine Islands. At no period in the history of the United States could money be secured from the United States Treasury except after an appropriation by Congress and on warrants drawn by some one of the heads of the various executive departments—now the Secretary of the Treasury—and countersigned by the Comptrollers of the Treasury, now the Comptroller General of the United States. *Also, at no time in our history have public moneys been advanced to officers of the Government for expenditure in their discretion and without being required to account therefor except in a few instances in time of war.*

"In the early days there was some dispute between the executive departments and the Comptrollers of the United States Treasury as to whether their settlements were final and conclusive on the executive departments, but this dispute was settled in favor of the contentions of the comptrollers by the act of March 30, 1868 (15 Stat. 54), which provided that such settlements should 'be taken and considered as final and conclusive upon the executive branch of the Government.' There was a recommendation before Congress in 1869 for repeal of this provision, but the House Committee on Revision of the Laws reported unfavorably thereon. The committee said that:

"'* * * Power in the head of the War or any other department to set aside and change the findings of the accounting officers of the Government is at war with the whole principle upon which the system is based; that the allowance and settlement of the disbursement of all public funds should be vested wholly in a set of officers other and different from those who made the expenditure. If their allowances and settlements can be set aside and changed by the head of the depart-

ment under whose direction the money was paid or the claim accrued, then the whole system of checks to improper expenditures, which it was supposed had been established, falls to the ground. (26 Cong. Rec. 4342.)[3]

"No change has ever been made in this provision, and same was carried into the organic act as

[3] Notwithstanding the act of March 30, 1868 (15 Stat. 54), carried into the Revised Statutes as Section 191 and into the Budget and Accounting Act of June 10, 1921 (42 Stat. 24), as a part of Section 304, and Section 24 of its Organic Act of 1916, conferring on the Auditor "like authority as that by law conferred upon the several auditors of the United States and the Comptroller of the United States Treasury," except as expressly provided in said Section 24 (and the exception is an increase in authority), the Supreme Court for the Philippine Islands said in the recent case of *Magdaleno Riel v. Wright*, in answer to the contention of the Auditor that the courts of the United States did not control the auditors and Comptrollers in their construction of general appropriation Acts, that:

> "For a number of years, it has been and is now the policy of this Court to follow and respect the decisions of the Supreme Court of the United States in so far as these decisions construe or apply to the law of the Philippine Islands, and if it be a fact that the Insular Auditor has the same powers and duties as the U. S. Comptroller, we would follow and approve those decisions.
>
> The vice of the argument made by the Insular Auditor in person lies in his assumption that, under the law of the Philippine Islands, he has like powers and duties as the U. S. Comptroller under the laws of the United States.
>
> As was pointed out in the Ynchausti case, the law here expressly says that the decisions of the Insular Auditor are binding upon the "executive branch" of the government. The fact that the law specifically says that his decisions are binding upon the "executive branch" of the government, under all rules of statutory construction, clearly implies and carries with it that his decisions are binding upon the executive branch only, and that they are not binding upon any other branch of the government.
>
> Under the law of Congress, there is no such limitation upon the powers and duties of the U. S. Comptroller. The finality of his decisions is not confined or limited to the executive branch of the government, but they apply with equal force and effect upon all branches. If and when the law is amended to confer upon the Insular Auditor of the Philippine Islands like powers and duties as those of the U. S. Comptroller, the authorities cited by the Insular Auditor would then be in point, and will be followed and approved by this Court. Until such time as that is done or our decision is overruled by the United States Supreme Court, upon that question we will follow and approve the law as laid down by this Court in its former decisions." Compare decision of same court in *Lambs v. Phipps*, (22 Phil. Rep. 480).

to the effect of the settlements of the Auditor for the Philippine Islands, and it was said by the Court of Claims in Geddes v. United States (38 Ct. Cl. 428), at page 444, that:

" 'The accounting officers are the guardians of the appropriations. It is their business to see that no money is paid out of the Treasury unless the payment is authorized by an appropriation act. It is not their business to adjudicate abstract questions of legal right beyond the legal right of a person to be paid out of a specific appropriation. An appropriation constitutes the means for discharging the legal debts of the Government.

'The judgment of a court has nothing to do with the means—with the remedy for satisfying a judgment. It is the business of courts to render judgments, leaving to Congress and the executive officers the duty of satisfying them. * * *'

"There was no right to sue the United States prior to 1855, and even after such right to sue had been given, Congress did not authorize the payment of judgments from general appropriations in the Treasury but required such judgments to be reported to it for specific appropriations with which to pay same. (See act September 30, 1890, 26 Stat. 537.) In other words, Congress remained in control over appropriated public money through the Comptrollers of the Treasury, and the judgments of the courts had nothing to do with such appropriated moneys.

"Prior to 1855, when the United States consented to be sued, there were several attempts to secure public money from the United States Treasury by means of extraordinary judicial process against public officers, but such attempts were uniformly abortive.

"Even after the United States had consented to be sued, the Supreme Court of the United States denied a writ of mandamus against the Comptrollers of the Treasury (United States v. Lynch, 137 U. S. 280); and while such writs had been allowed

in a few instances against other officers of the Government to require payment of some specific appropriation made by Congress (Houston v. Ormes, 252 U. S. 469, and Smith v. Jackson, 241 Fed. 747, 246 U. S. 388), *it was believed when the organic act was enacted that the incorporation in said act of the language contained in laws relating to the auditors and Comptrollers of the Treasury with respect to the finality of their settlements would give the auditor for the Philippine Islands the same immunity from control by extraordinary judicial process.*" (Italics ours.)

We are not required to invoke the principle of interpretation applied in *Rex v. Roberts* for the reason that the Organic Act of 1916, subjecting all accounts for revenues from whatever source, and all expenditures of money to the settlements of the Auditor, is a later statute than the Philippine Tariff Act of 1909, under which it is claimed the Auditor has a mere ministerial duty to perform with respect to the accounts and claims of the Collector of Customs. It is true that the Philippine Legislature, in 1919, amended Section 200 of the Philippine Tariff Act of 1909, to add the phrase "so that the work can not be done there reasonably, economically, and within a reasonable time, in the judgment of the Collector." We submit, however, that the Philippine Legislature, does not have the power, under Section 10 of the Organic Act of 1916 (39 Stat. 545, 548), to enact legislation contrary to the terms of the Organic Act or to impose certain duties on officials other than the officials specified in the Organic Act or any other act of Congress respecting the Government of the Philippine Islands. The authority conferred by that section related to changes in duty rates, only. The Philippine Legislature, with the concurrence of the

President, has not the power to change the form of Government established by the Congress for said Islands or to transfer to some other official jurisdiction and duty to settle claims against the Government which the laws of Congress have reposed in the Auditor (pp. 46-48, main brief).

Counsel for the Company criticize (p. 17), our argument (pp. 42-43) to the effect that when no appeal is taken to the Courts of First Instance from a decision of the Collector, as provided in Sections 1383 and 1384 of the Code, the claim remains in the executive branches of the Philippine Government and any collection or allowance by the Collector is subject to the audit and settlement of the Auditor, his countersignature to a warrant being required before any claim for refund can be paid. The situation is far from being anomalous. A similar situation exists in the United States as to claims against the District of Columbia. There is an auditor for the District of Columbia, but all accounts and claims settled and allowed by him are required to be subsequently settled by the accounting officers of the Treasury, now the General Accounting Office. Section 2 of the act of March 3, 1883 (22 Stat. 471). In a decision of November 27, 1908, the Comptroller of the Treasury said:

> "Under the system of laws provided for paying the expenses of the District of Columbia, Congress has only provided for advancing to the District of Columbia out of the Treasury of the United States the moneys necessary to enable said District to pay the debts properly incurred by it and required the said District to account for the disbursement of such advances on vouchers properly certified by the Commissioners. The claim of a creditor (of the District of Columbia not allowed by the

> Commissioners) is not one that the Auditor for the State and other Departments has any authority to settle and adjust" under the act of March 3, 1883.

In other words, if the Commissioners of the District of Columbia refuse to allow a claim, the recourse must be either to the Congress or to the courts and thence to the Congress for an appropriation. The accounting officers of the United States are not concerned therewith. If the Commissioners do allow the claim, such allowance is subject to audit and settlement by the accounting officers of the United States, and the Commissioners frequently avail themselves of the provisions of Section 8 of the act of July 31, 1894, to secure from the Comptroller advance decisions to guide them in their approval or disapproval of claims. See, for instance, 4 Comp. Gen. 511, *id.* 552. So here, if the Collector refuses to approve a claim for refund of customs duties, the claimant must resort to the Court of First Instance or to the Philippine Legislature. If he does approve the claim, it is subject to audit and settlement of the Auditor and his decision is made final and conclusive on the Collector. Since the exercise by the Auditor of this semi-judicial authority and jurisdiction in the settlement of the claim for refund of custom duties[4] and in determining the availability

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[4] Hotchkiss, *Judicial Work of the Comptroller of the Treasury* (1911), after comparison of the work of the accounting officers of the United States with the work of similar officers in France and Germany (and he might have made a similar comparison with the work of the Comptroller and Auditor General of England, see Willoughby, Willoughby and Lindsay, *Financial Administration of Great Britain* (1917), pp. 144-182, 209-234), said (pp. 141-142) that:

> "Among the many branches of government activity by which the law is being developed and construed, there is nowhere a more intimate connection with the property rights of individuals than in the judicial work of the Comptroller. In addition to a jurisdiction on a

of appropriations to pay same involve judgment and discretion of the highest order and since there is no statutory provision for review by the courts of his action, it follows, under a long line of decisions summarized in *Work v. Rives* (207 U. S. 175), that the court below erred in issuing a writ of mandamus against the Auditor to require him to countersign a warrant for payment of said claim.

Conclusion

We submit for the reasons advanced in our main brief and for the reasons herein advanced that the judgment of the court below is erroneous and should be reversed with directions to dismiss the petition.

Respectfully submitted,

L. H. HEDRICK,
O. R. MCGUIRE,
Attorneys for Petitioner.

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par with that of the Continental courts of accounts, which the Comptroller possesses as chief of the accounting department of the government, he exercises in part at least, the jurisdiction over private claims which is lodged in France with the regular administrative courts. Though his decisions are final only when the claimant chooses not to undertake the burden of a suit [against the United States] at law, ~~the power to sue is a right to undertake the burden of a suit at law~~ the power to sue is a right which in the vast majority of cases it is impracticable to exercise. In the actual operation of our system the Comptroller is usually the final judge."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. [redacted]316

BEN F. WRIGHT, AUDITOR FOR THE PHILIPPINE ISLANDS,
Petitioner,

v.

YNCHAUSTI & COMPANY, *Respondent.*

BRIEF OF RESPONDENT ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

ALEXANDER BRITTON,
LAWRENCE H. CAKE,
Counsel for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 1051.

BEN F. WRIGHT, AUDITOR FOR THE PHILIPPINE ISLANDS,
Petitioner,

v.

YNCHAUSTI & COMPANY, *Respondent.*

BRIEF OF RESPONDENT ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

January 19, 1925, Ynchausti & Company filed in the Supreme Court of the Philippine Islands a petition for a writ of mandamus to be directed to Ben. F. Wright, Insular Auditor, to require him to countersign a warrant for 159,960 pesos drawn by the Insular Collector of Customs in favor of the petitioner. (R. 2-5.) The Insular Auditor filed an answer, to which the petitioner demurred on the ground that the facts stated therein

were not sufficient to constitute a defense. The Supreme Court of the Philippine Islands, after hearing argument and re-argument, ordered that the writ issue as prayed. A motion for reconsideration was denied, and final judgment was entered, October 6, 1925. Following is a statement of the facts in the case.

In 1924, Ynchausti & Co., agent and operator of the steamship *Venus*, a vessel engaged in the coastwise trade in the Philippine Islands, caused certain heavy repairs and construction work to be done at Hongkong.

The Philippine Tariff Act of 1909 provided that a duty should be imposed on the cost of such repairs made in foreign countries unless it was made to appear "upon proof satisfactory to the collector of customs that adequate facilities are not afforded in the Philippine Islands for such repairs, so that the work can not be done there reasonably economically and within a reasonable time, in the judgment of said collector."

When the vessel arrived in Philippine waters the Insular Collector of Customs assessed a customs duty of 159,960 pesos on account of the repair work done at Hongkong, which was paid to him by Ynchausti & Co. under protest, the protest being on the ground that the repairs were not dutiable under the law.

Thereafter, the Insular Collector of Customs, after a hearing, rendered a decision sustaining the protest and ordered a refund of the money paid. All the requirements of law,—the Tariff Act of 1909, and the Administrative Code, 1917,—were fully complied with and copies of the Collector's decision were sent to the Secretary of Finance and the Insular Auditor. No appeal from the Collector's decision was taken to the

Court of First Instance, as authorized by law, although the Insular Auditor did request and urge that such an appeal be taken.

After the time for an appeal had expired, a warrant was drawn by the Collector in favor of Ynchausti & Co. for 159,960 pesos, the amount of the duty found to have been wrongly assessed and collected. Upon presentation of the warrant to the Insular Auditor for his countersignature, as provided in section 621 of the Administrative Code, he refused to countersign it. The petition alleged and the answer admitted that at the time the petition was filed he still persisted in his refusal to countersign the warrant.

THE POINTS OF LAW.

On the foregoing statement of the case the questions which immediately suggest themselves are:

(1) Was the Insular Collector of Customs vested with jurisdiction and authority to render a decision on the protest and to determine whether the claimant was entitled to a refund of the money paid?

(2) Was the Insular Auditor vested by law with any power of review or control over the decision of the Insular Collector of Customs in such a case?

(3) Did the Insular Auditor's action in countersigning the warrant, as provided in section 621 of the Administrative Code, involve the exercise of a judicial discretion?

(4) Was the application for a writ of mandamus the only remedy?

(1) WAS THE INSULAR COLLECTOR OF CUSTOMS VESTED WITH JURISDICTION AND AUTHORITY TO RENDER A DECISION ON THE PROTEST AND TO DETERMINE WHETHER THE CLAIMANT WAS ENTITLED TO A REFUND OF THE MONEY PAID?

The answer is that the Philippine Tariff Act of 1909, as originally enacted and as since amended, has vested the Insular Collector of Customs with absolute and exclusive jurisdiction and authority to determine in a given case the dutiability of repairs made abroad on vessels of Philippine registry.

The Philippine Tariff Act of 1909,—Act August 5, 1909, c. 8, 36 Stat. 130,—contains the following:

> "Sec. 8. That the rates of duties to be collected on articles, goods, wares, or merchandise imported into the Philippine Islands, or going into said islands from the United States or any of its possessions except as otherwise provided in this Act, shall be as follows:
>
> * * * * * * * * *
>
> '200. Boats, launches, lighters, and other water craft, set up or knocked down, imported into the Philippine Islands, *and cost of repairs made in foreign countries to vessels, or to parts thereof, documented for the Philippine coastwise trade or plying exclusively in Philippine waters and for which repairs adequate facilities are afforded in the Philippine Islands,* fifty per centum ad valorem.
>
> '*Provided,* That *upon proof satisfactory to the collector of customs that adequate facilities are not afforded in the Philippine Islands for such repairs,* the same shall be subject to the provisions of paragraph three hundred and forty-eight of this Act; and
>
> '*Provided further,* That if the owner or master of such vessel shall furnish evidence satisfactory

to the collector of customs that such vessel while in the regular course of her voyage was compelled by stress of weather or other casualty to put into a foreign port or place and make such repairs to secure the safety of the vessel or to enable her to return to the Phillippine Islands, such duty shall not be imposed; and

'*Provided further*, That furnishings, stores, and supplies, not otherwise provided for, purchased abroad and imported in such vessels shall be dutiable under the corresponding paragraphs of this Act.

The expression 'imported into the Philippine Islands,' shall be held to mean 'brought into the jurisdictional waters of the Philippine Islands in or on another vessel, or towed therein by another vessel (except when becalmed or disabled at sea), as distinguished from coming into said islands under the craft's own steam, sail, or other motive power.' * * *

'SEC. 11. That the following articles shall be free of duty upon the importation thereof into the Philippine Islands upon compliance with regulations which shall be prescribed in accord with the provisions of each paragraph:

* * * * * * * * *

'348. Repairs to vessels documented in the Philippine Islands or regularly plying in Philippine waters, made in foreign countries, *upon proof satisfactory to the collector of customs that adequate facilities for such repairs are not afforded in the Philippine Islands.*' "

In *Fernandez Hermanos v. Insular Collector of Customs*, 30 Phil. Reps. 50, the Supreme Court of the Philippine Islands held that if the repairs *as a whole* could not be made in the Philippine Islands, they might all be made abroad and would come in free of duty, on the ground that the act made no distinction between re-

pairs which could be made in the Islands and repairs which would have to be made abroad.

In *Gutierrez Hermanos v. Insular Collector of Customs*, 39 Phil. Rep. 876, which involved the same provision of the Tariff Act, in a case in which it was shown that there were adequate facilities in the Philippine Islands for making and installing all the repairs and parts except the manufacture of a tail shaft which would have to be brought in from abroad, the court held that such repairs, if done in a foreign port, would be subject to duty.

In view of the decision in the latter case which, it was feared by some, might lead to restrictive administrative interpretation, thereafter, November 24, 1919, the Philippine Legislature, acting under the authority conferred by section 10 of the Organic Act,* enacted Act No. 2872, which was approved by the President of the United States on November 24, 1919, and published by the Governor General by proclamation dated December 11, 1919. Vol. XVII Official Gazette, 2055. The act amended section 8, paragraph 200 of the Tariff Act of 1909, *supra*, to read as follows:

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*Act August 29, 1916, c. 416, 39 Stat. 545; sometimes referred to as the Jones Act; section 10 of which provides:

"Sec. 10. That while this Act provides that the Philippine government shall have the authority to enact a tariff law the trade relations between the islands and the United States shall continue to be governed exclusively by laws of the Congress of the United States: *Provided*, That tariff acts or acts amendatory to the tariff of the Philippine Islands shall not become law until they shall receive the approval of the President of the United States, nor shall any act of the Philippine Legislature affecting immigration or the currency or coinage laws of the Philippines become a law until it has been approved by the President of the United States: *Provided further*, That the President shall approve or disapprove any act mentioned in the foregoing proviso within six months from and after its enactment and submission for his approval, and if not disapproved within such time it shall become a law the same as if it had been specifically approved."

"200. Boats, launches, lighters, and other craft, set up or knocked down, imported into the Philippine Islands, and cost of repairs made in foreign countries to vessels, or to parts thereof, documented for the Philippine coastwise trade and plying usually in Philippine waters and for which repairs adequate facilities are afforded in the Philippine Islands, fifty per centum ad valorum until December thirty-first, nineteen hundred and twenty-four; twenty-five per centum ad valorum on and after January first, nineteen hundred and twenty-five.

"Provided, That upon proof satisfactory to the collector of customs that adequate facilities are not afforded in the Philippine Islands for such repairs, *so that the work can not be done there reasonably economically and within a reasonable time, in the judgment of said collector*, such repairs shall be subject to the provisions of paragraph three hundred and forty-eight of this Act," etc.

The effect of the amendment was to add to the proviso the words "so that the work can not be done there reasonably economically and within a reasonable time, *in the judgment of said collector.*"

It is obvious that by the Tariff Act of 1909, as amended, the Insular Collector of Customs is vested with *exclusive* jurisdiction to determine the question of fact whether in a given case there are adequate facilities in the Philippine Islands, so that the work can be done reasonably economically and within a reasonable time.

His decision and finding of fact, in this case, that there were no adequate facilities in the Philippine Islands for the repairs in question (R. 19-20), is final and conclusive and binding on all administrative officers of the Philippine Government, no appeal having

been taken from his decision to the Court of First Instance, as authorized by law.

(2) Was the Insular Auditor Vested by law With any Power of Review or Control Over the Decision of the Insular Collector of Customs in Such a Case?

The Insular Auditor derives his powers from the Organic Act,—Act August 29, 1916, c. 416, 39 Stat. 445,—the purpose of which was "to declare the purpose of the people of the United States as to the future political status of the people of the Philippine Islands, and to provide a more autonomous government for those islands."

If the Insular Auditor has any power to review the decision of the Insular Collector of Customs, or any discretionary or quasi-judicial duty to perform in such a case as this, it must be found in section 24 of that Act, which provides:

> "Sec. 24. That there shall be appointed by the President an auditor, who shall examine, audit, and settle all accounts pertaining to the revenues and receipts from whatever source of the Philippine government and of the provincial and municipal governments of the Philippines, including trust funds and funds derived from bond issues; and audit, in accordance with law and administrative regulations, all expenditures of funds or property pertaining to or held in trust by the government or the Provinces or municipalities thereof. He shall perform a like duty with respect to all government branches.
>
> He shall keep the general accounts of the government and preserve the vouchers pertaining thereto.

It shall be the duty of the auditor to bring to the attention of the proper administrative officer expenditures of funds or property which, in his opinion, are irregular, unnecessary, excessive, or extravagant.

* * * * * * * * *

"The administrative jurisdiction of the auditor over accounts, whether of funds or property, and all vouchers and records pertaining thereto, shall be exclusive."

* * * * * * * * * *

"The decisions of the auditor shall be final and conclusive upon the executive branches of the government, except that appeal therefrom may be taken by the party aggrieved or the head of the department concerned within one year, in the manner hereinafter prescribed. The auditor shall, except as hereinafter provided, have like authority as that conferred by law upon the several auditors of the United States and the Comptroller of the United States Treasury and is authorized to communicate directly with any person having claims before him for settlement, or with any department, officer, or person having official relations with his office."

The Insular Auditor contends that by that section he is vested with exclusive jurisdiction and authority to determine whether "any claim" for the payment of money (including a claim as in this case for the repayment of money paid to the Insular Collector of Customs under protest and later found and determined by that Officer, acting under the Tariff Act of 1909 as amended, to have been wrongly collected) shall be recognized and paid, and that his duty is discretionary and quasi-judicial notwithstanding the express language of section 8, paragraph 200, and section 11, paragraph 348 of the Tariff Act of 1909, as amended.

That his contention is unsound is at once apparent from a reading of the Tariff Act of 1909, as amended by Act No. 2872 of the Philippine Legislature, which is of equal force and validity as the Organic Act and must be read with it.

Certainly the Tariff Act of 1909 is an act of Congress,* as is the Organic Act, and certainly the amendatory act No. 2872 enacted by the Philippine Legislature under the authority conferred by *section 10 of the Organic Act* and approved by the President of the United States, is a valid and effective amendment.

The Tariff Act of 1909, as originally enacted, provided that repairs made in foreign countries should be free of duty "upon proof satisfactory to the collector of customs that adequate facilities for such repairs are not afforded in the Philippine Islands." The amendment by act No. 2872 added the words "so that the work cannot be done there reasonably economically and within a reasonable time, *in the judgment of said Collector.*" As we have already pointed out, it is impossible to read those provisions with section 24 of the Organic Act and find any ground whatever for the Insular Auditor's contention that *he* is vested by law with a discretionary or quasi-judicial jurisdiction in such matters.

It may be observed also that the Auditor did not put his defense on the ground that funds were not available for the payment of the warrant. In fact, he could not do so, as the Supreme Court of the Philippine Islands points out in its decision (R. 84), because there is at all times a permanent and continuous appropriation for the payment of such refunds, provided by Act No. 357 as amended by Act No. 1515.

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*It is "a statute of the United States." *Gsell v. Insular Collector of Customs*, 239 U. S. 93.

In the brief in support of the petition for certiorari counsel undertake to argue the general proposition that the determination of the availability of a general appropriation for the payment of claims is always a quasi-judicial or discretionary matter within the exclusive jurisdiction of the accounting officers. We submit, however, that that question is not at all involved in this case, first, because the Auditor has not defended the case or put his refusal to countersign the warrant on that ground, and second, because in any event the law here has expressly conferred on the Collector of Customs the exclusive power to decide the question of *fact* on which the right to the refund depends. The Auditor's broad contention has been that he has some power of review of the Collector's decision on that question of *fact*. That contention of the Auditor is the only question which is presented by this petition for certiorari and all argument and discussion of other issues is beside the point.

(3) Does the Insular Auditor's Action in Countersigning the Warrant, as Provided in Section 621 of the Administrative Code, Involve the Exercise of a Judicial Discretion?

It has been held repeatedly that where such discretion is vested in another officer as is here vested in the Insular Collector of Customs the decisions of that officer with respect to such matters are conclusive and binding on the accounting officers of the Government.

United States v. Jones, 18 How. 92.
United States v. Johnston, 124 U. S. 236.

In *Savings Bank of Pittsburgh v. United States*, 16 Ct. Cl. 335, the Commissioner of Internal Revenue had

made a certificate of allowance of claim and the Secretary of the Treasury had approved it, but the Comptroller refused to pass the allowance and to countersign the warrant. Quoting from the opinion of the court:

> "At the trial it was argued that the decision of the Comptroller refusing to pass the allowance and to countersign a warrant for its payment had some bearing upon the claimant's right to recover in this court. But such is not the case. The Comptroller is merely an accounting officer, the agent of one only of the parties to claims against the government, the officer clothed with authority to determine whether the Treasurer shall be authorized to pay a demand in the form and under the circumstances in which it is presented to him, and not an arbitrator to finally settle and determine the legal rights of both parties."

In a similar case, *Barnett v. United States*, 16 Ct. Cl. 515, the court said:

> "Four cases of this description have been before us, in each of which we were called upon to declare our judgment upon the effect of section 3220 of the Revised Statutes, which, so far as it defines the powers of the Commissioner of Internal Revenue, is as follows:
>
> > 'Sec. 3220. The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected.'

> In each of those four cases the Commissioner made an allowance of a refund of taxes illegally assessed; in each of them the Comptroller of the Treasury refused to pass the claim; and in each of them this court gave the claimant judgment for the amount which the Commissioner had allowed. (*Kaufman's Case*, 11 C. Cls. R., 659; *Woolner's Case*, 13 *ib.*, 355; *Bank of Greencastle's Case*, 15 *ib.*, 225; and *Real Estate Savings Bank of Pittsburgh's Case*, *ante*, 335.)
>
> Only one of those cases—that of Kaufman—has been passed upon by the Supreme Court of the United States, and in that our judgment was affirmed."

In the present case there was no room for the exercise by the Auditor of any judicial discretion. As pointed out in the opinion of the Supreme Court of the Philippine Islands (R. 77), the Insular Auditor's duty was "confined and limited to an investigation of the primary and fundamental facts as to whether a protest was duly filed and a hearing was duly had upon the protest, and that the Collector of Customs had ordered the refund of the money in question and whether there had been a compliance with all of the legal formalities concerning the protest."

That duty involved nothing more than a ministerial discretion, and the remedy by mandamus to compel the performance of that duty is clear.

> *Lane v. Hoglund*, 244 U. S. 174,
> L. R. A. 1916-D, p. 324, note,
> 18 R. C. L. 223-225, secs. 148-149.

In *Hoey v. Baldwin*, 1 Phil. Rep. 551, the petitioner alleged that proper certificates showing that he was entitled to receive his salary had been filed with the de-

fendant. It was held: "The only duty which the defendant had to perform in this case was to pay the money to the plaintiff. This was a duty purely ministerial, which the law specially enjoins as a duty resulting from his office."

In *Lamb v. Phipps*, 22 Phil. Rep. 456, the court was called upon to decide whether the Insular Auditor, in examining and settling an account and balancing items of debit and credit, was exercising a judicial discretion not controllable by mandamus. It was held that he was, but the court said:

> "Auditors and comptrollers, as accounting officers, are generally regarded as quasi-judicial officers. They perform *mere ministerial duties* only in cases *where the sum due is conclusively fixed by law or pursuant to law.* Except in such cases, the action of the accounting officers upon claims * * * is not ministerial merely but judicial and discretionary."

In *Zobel v. City of Manila*, XXXIII O. G. 411, recently decided, the Supreme Court of the Philippine Islands said:

> "Another reason advanced for supposing the contract for the purchase of this property to be invalid, or at least unenforcible, is that the Insular Auditor has refused to countersign the warrant for the first instalment of the purchase price; and it is insisted for the defendant that this action on his part is conclusive against the plaintiffs. Their sole recourse, so it is claimed, is, or rather was, by way of administrative appeal from the action of the Auditor to the Governor-General. The suggestion is in our opinion without merit. The general provisions of law defining the jurisdiction and powers of the Auditor and which, if

literally construed, would seem to make him absolute arbiter of all claims of any sort against all branches of the Government must be considered to be qualified as regards the contract rights of persons dealing with the city by the more specific provisions declaring how and by whom contracts can be made which will be binding on it. It was not intended that the Auditor should possess a general veto power over all city contracts, and his refusal to countersign the warrant referred to is of no moment in this action to enforce the legal liability of the city."

It is idle to say that the acts of the accounting officers of the United States, or the Insular Auditor, can not be controlled by mandamus or injunction. Any officer acting beyond his authority under the law may be enjoined upon the application of anyone who shows that he is being injured by such unauthorized acts. Likewise any officer who refuses to perform a ministerial duty imposed by law may be required to do so by mandamus.

Accounting officers are not exempt from the rule.

Smith v. Jackson, 246 U. S. 388.
McCarl v. Cox, 8 Fed. (2d) 669 (certiorari denied March 15, 1926).
Dillon v. Groos, 299 Fed. 851.
Mare v. Alexander, 2 Fed. (2d) 895, 5 Fed. (2d) 964.
Pence v. McCarl, 54 Wash. Law Rep. 178.

(4) Was the Application for a Writ of Mandamus the Only Remedy?

In this case the complainant had no other remedy. Certainly it had no remedy by suit against the Philippine Government, because there is no provision of law authorizing such a suit.

Neither did it have any remedy by appeal to the Governor General, as suggested by counsel for the Insular Auditor. The provision in section 25 of the Organic Act, that any person aggrieved by the action or decision of the Insular Auditor in the settlement of an account or claim before the Auditor under section 24, may take an appeal to the Governor General and to the Secretary of War, obviously refers to accounts and claims before the Insular Auditor which he is required to "examine, audit, and settle" and which involve the exercise of a judicial discretion. His duty in this case, however, is limited to countersigning the warrant drawn by the Insular Collector of Customs (after satisfying himself that the Collector has rendered a decision in a case properly before him under the Tariff Act of 1909, and that the amount of the warrant is in accordance with the terms of the decision). The duty in this case is plainly ministerial and involves the exercise of no judicial discretion. The Auditor's refusal to act, therefore, can not be corrected by an appeal to the Governor General.

In *Compania General de Tabacos v. French*, 39 Phil. Reps. 34, the Supreme Court of the Philippine Islands said:

> "The failure to appeal from the Auditor's decision does not affect petitioner's right of redress in the courts.
>
> "In considering the case before us, it is important to bear in mind that the Government is admittedly indebted to the petitioner in the definite and certain sum of P322.93. No action, either administrative or judicial, is therefore necessary to fix this liability upon the Government. In so far as legal liability can result from governmental activities, liability exists and upon the demurrer

is admitted. Furthermore, said liability is such that it should be absolved by a warrant drawn by the Purchasing Agent and countersigned by the Insular Auditor. The law makes provision for the payment of the money in this way, and it cannot otherwise be gotten out of the Insular Treasury.

"The legal remedy here indicated as proper is the writ of mandamus to compel the Purchasing Agent and the Insular Auditor to issue, countersign, and deliver the proper warrant to the petitioner. (Hoey vs. Baldwin, 1 Phil. Rep. 551.)

"The liability of these officers to the coercive process of mandamus arises from the fact that a valid claim exists for the payment of which provision has been made, that these officers are the appointed agents for making the payment, and that under these circumstances the execution and delivery to the creditor of the warrant are merely ministerial functions involving no discretionary action whatever."

CONCLUSION.

This petition for certiorari presents no question of general public interest or of special novelty. The Congress of the United States has vested the Insular Collector of Customs with power and jurisdiction to determine in any case whether there are adequate facilities in the Philippine Islands for making repairs to vessels. Acting pursuant to that authority the Collector, in this case, found as a fact and decided that the repairs could not be made in the Philippine Islands and that as a result the respondent was entitled to an immediate refund of the duties paid under protest. The method prescribed by law for reviewing the decision of the Collector, by appeal to the Court of First Instance, was not followed, but the Auditor (petitioner

here), assuming the power of review possessed only by the court, undertook to overrule the Collector by refusing to countersign the warrant.

All questions presented and argued in this petition and supporting brief are technical in nature and made with the intention and hope of sustaining, if possible, this power of review claimed by the Insular Auditor. As such a result would be so clearly contrary to the plain provisions of the law and so subversive of the orderly course of business, it should not be permitted.

Respectfully submitted,

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